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IN THE  
**Supreme Court of the United States**

October Term, 1960

**No. 84**

In the Matter of  
**ALBERT MARTIN COHEN,**  
*Petitioner,*

—v.—

**DENIS M. HURLEY,**  
*Respondent.*

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF  
THE STATE OF NEW YORK AND THE SUPREME COURT OF  
THE STATE OF NEW YORK, APPELLATE DIVISION, SECOND  
DEPARTMENT, JOINTLY OR IN THE ALTERNATIVE.

**REPLY BRIEF FOR THE PETITIONER**

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**REPLY BRIEF FOR THE PETITIONER**

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**I.**

**Respondent has adduced no proof that Petitioner is unfit to practice law. In the absence of such proof, to disbar him denies him due process.**

It would be well at the outset to clear away the underbrush of matters not in dispute here. Respondent in his Brief (POINT I) argues at great length that, "Membership in the Bar is a privilege burdened with conditions," and

that the State must have the power to strike from the rolls an attorney lacking in good character. Petitioner quarrels with none of this. He maintains only that the conditions imposed upon attorneys must not be arbitrary and that a disbarment proceeding must be conducted in accordance with the dictates of due process. And this much at least Respondent seems to concede.

What is at issue is whether the State has acted arbitrarily in disbarring Petitioner. Respondent maintains that an attorney who refuses to answer questions posed by a secret judicial inquiry *ipso facto* demonstrates his unfitness. According to Respondent, the reason for the refusal, the absence of any evidence of misconduct, the prior unblemished record of the refuser, and the context of the refusal are all irrelevant. The refusal alone is indelibly and unassailably damning. As Respondent's Brief (p. 10) puts it:

"The refusal of a lawyer to answer relevant questions, without more, constitutes a breach of those duties, and warrants the taking of disciplinary action against the lawyer."

This, Petitioner urges, is arbitrary.

In support of this position, Respondent cites *People ex rel. Karlin v. Culkin*, 248 N. Y. 465, and *Matter of Rouss*, 221 N. Y. 81. He cites *Karlin* no less than eight times and *Rouss* three times. Five times he quotes specific language from them. These cases are offered by Respondent to persuade this Court that it is proper to disbar an attorney for refusing to answer questions put to him by a judicial inquiry. Not once does Respondent even intimate that both decisions expressly recognize that an attorney's refusal

to answer questions in reliance on his privilege against self-incrimination stands on an entirely different footing from an unprivileged refusal.

In *Karlin*, where the attorney's refusal was not only unprivileged but contemptuous, Chief Judge Cardozo clearly stated that the court's concern was solely with a refusal to testify that had no basis in privilege. He said (248 N. Y. at 471):

"We are now asked to hold that when evil practices are rife to the dishonor of the profession, he may not be compelled by rule or order of the court, whose officer he is, to say what he knows of them, *subject to his claim of privilege if the answer will expose him to punishment for crime (Matter of Rouss, supra).*" (Emphasis added)

It was in response to this contention of the recalcitrant attorney that Chief Judge Cardozo, in the language heavily relied upon by Respondent, stated that a refusal to answer should lead to expulsion. Notwithstanding the fact that the sentence quoted above appears in one of the very paragraphs from which Respondent quotes, his Brief would leave this Court with the impression that the *Karlin* case condemned a privileged refusal to testify.

Respondent's reliance on *Rouss* is equally disingenuous. Respondent has said in his Brief (p. 26) that Petitioner "... was disciplined for having refused to answer relevant questions in the judicial inquiry, such conduct having constituted a breach of the condition on which depended his privilege of membership in the Bar (*Matter of Rouss*, 221 N. Y. 81). . . ." *Matter of Rouss* did not even involve a refusal to testify. Rouss had testified at a criminal trial and

His disbarment followed upon the damaging statements he made in the course of his testimony.

*Rouss* does not merely fail to support Respondent. In addition, it flatly and unequivocally repudiates the very principle urged by Respondent. Writing for the court, Chief Judge Cardozo said therein (221 N. Y. at 90):

"Our decision in *Matter of Kaffenburgh* (188 N. Y. 49), is pressed upon us as controlling. But we think it is inapplicable. Kaffenburgh had refused to answer when called as a witness upon the trial of an indictment for conspiracy. He put his refusal on the ground that the answer would tend to criminate him. That was before the enactment of section 584 of the Penal Law.\* Disbarment proceedings were afterwards begun, and the charge was made that the refusal to answer was professional misconduct. That charge was not sustained either in the Appellate Division or in this court. Disbarment was ordered, but on other grounds. Much that was said was in reality unnecessary to the decision. There was no occasion to determine whether Kaffenburgh's refusal to testify was proper because it tended to expose him to a forfeiture of office. He had placed his refusal on the ground of a tendency to criminate him, and that of itself was sufficient to sustain him." (Emphasis added)

And it is the case of *Matter of Rouss* to which Chief Judge Cardozo approvingly referred in the sentence quoted above from *People ex rel. Karlin v. Culkin*.

\* This section, if it had been in effect at the time Kaffenburgh was called to testify, would have granted him automatic immunity in return for his testimony. Similarly, in the instant case there was no statute whereby Petitioner would have received immunity in return for his testimony before the Inquiry.

Notwithstanding this clear affirmation of the principle that an attorney's refusal to answer questions in reliance on his privilege against self-incrimination does not constitute professional misconduct, Respondent, quoting out of context, urges *Rouss* and *Karlin* on this Court for the contrary principle.

Respondent does not claim that any other cases state or hold that an attorney's refusal to answer the Inquiry's questions, whatever the circumstances, whatever his character, whatever his reasons for refusing, *ipso facto* reveals him to be unfit to practice law. Nor does he seek to meet Petitioner's argument that such a position ignores the lesson of this Court's decisions in *Schware v. Board of Bar Examiners*, 353 U. S. 232, and *Konigsberg v. State Bar of California*, 353 U. S. 252 (See Petitioner's Main Brief at pp. 16-22). Indeed, one will look in vain for so much as a citation to the *Konigsberg* case in Respondent's Brief, although its pertinence is clear. Presumably, Respondent has no answer to the fact that this Court has twice held that a refusal to answer questions will not by itself support an inference of bad moral character or unfitness where the bar applicant's good character or fitness is otherwise unquestioned. The instant case is even stronger since here the petitioner has already demonstrated his fitness and good character in being admitted and practicing for thirty-seven years without a blot on his record.

Lacking any cases in support and unable to distinguish the previous decisions of this Court, Respondent relies in his Brief instead on the argument that Petitioner must be disbarred in order to protect the public. He says (pp. 17-18):

"In licensing a person to practice the profession of the law, the court represents to society at large that here is an honorable man deserving of its trust and confidence—one who is worthy to uphold the honor of the profession and the dignity of the court. When the lawyer, as an officer of the court, refuses to give an accounting of his stewardship, and refuses to answer to the court for his professional practices, then the lawyer loses his 'good standing' as an instrument or agency to advance the ends of justice. (See *Theard v. United States*, 354 U. S. 278, 281.)\* Disbarment must follow because the court can no longer represent to the public that the lawyer is worthy of trust and confidence."

And what is it that makes Petitioner, a man with a distinguished record of public service and thirty-seven unblemished years at the bar unworthy of public trust? It is, says the Respondent, solely and exclusively that in secret proceedings, in the course of which he was warned that the Inquiry had "information that indicates your participation in professional misconduct," but was not permitted to know what that evidence was, where it came from or whether any efforts had been made to test its credibility, he relied on the advice of his counsel and asserted, as he concededly had a right to do, his privilege against self-incrimination. What prudent attorney would not have given the same advice in these circumstances, especially since the New York authorities before this case plainly

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\* If *Theard* is cited for the proposition that the power to disbar exists to protect the public, citation was hardly necessary. The proposition is indisputable. If it is cited for the proposition that an attorney loses his good-standing whenever he "refuses to answer to the court for his professional practices," the citation is plainly inappropriate. *Theard* has nothing to do with this problem.

supported the assumption of Petitioner and his counsel that he would be breaching no duty by so acting? (See Petitioner's Main Brief, p. 20). It is this refusal and this alone that Respondent says makes Petitioner unfit to continue the practice of the law.

It is worth remembering that Respondent's Brief admits that Petitioner has in the past provided considerable information to the authorities charged with overseeing attorneys. Indeed, Respondent claims that "practically every question" asked Petitioner was based upon information which he had himself made available (Respondent's Brief, p. 6).<sup>\*</sup> It was only when he was placed in the threatening environs of the Inquiry that he took refuge in his constitutional privilege. Even then many of Petitioner's refusals were based not on an unwillingness to aid the Inquiry but on the fear that to answer would waive his privilege (See, e.g., Record, p. 43). Respondent cannot now wrench those refusals out of context and use them to destroy a man whose whole professional career has been characterized by candor and fairness.

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\* At the time of his questioning, Petitioner did not, of course, know what reckless charges might have been made against him by unseen informers. This is the first time that Respondent has intimated that there were none. But even now, as we shall show *infra*, there is good reason to doubt this belated disclaimer of Respondent.

## II.

Petitioner's refusal to answer the questions put to him by the inquiry does not prevent the State from obtaining the information that it seeks.

It has already been indicated that, by Respondent's own admission, Petitioner has provided the authorities with a substantial amount of information about his professional conduct. And in Petitioner's Main Brief (p. 25) it is pointed out that Petitioner's refusals do not leave Respondent impotent to obtain the information he seeks. Petitioner therein stated:

"The Inquiry's activities have been paralleled by a grand jury investigation into solicitation, conspiracy to solicit, and related misconduct by attorneys. The New York Courts have recently held that this same grand jury is empowered to grant immunity sufficiently to take the place of a witness' privilege against self-incrimination. *In re Cioffi*, [21 Misc. 2d 808, aff'd 10 A. D. 2d 425, aff'd N. Y. L. J., July 12, 1960, p. 6, col. 3]. Consequently, the State need only summon Petitioner before this grand jury to learn from him all that it desires to know."

Respondent says not so. Referring to the passage just quoted from Petitioner's Main Brief, Respondent's Brief (p. 30) states, "In aid of that proposition petitioner cites a case which completely demolishes his thesis, namely, the case of *In re Cioffi*. . . ." Respondent then proceeds to describe how Cioffi and another attorney refused to testify before the grand jury even though they had been granted full immunity from criminal prosecution. Respondent concludes that, "Instead of obtaining the information he

sought, the District Attorney was blocked, as we were, by the attorneys' refusal to answer questions—a situation parallel to that of the instant case" (p. 31).

Respondent fails to point out that the attorneys' refusals in *Cioffi* persisted only until the New York Court of Appeals authoritatively ruled that the grand jury's grant of immunity was proper. *Once that was established, Cioffi and the other attorney have testified before the grand jury and are continuing to do so.* It is inconceivable that Respondent is unaware of this fact, since it occurred well before he submitted his Brief to this Court, and he states in his Brief (p. 31) that he "is personally familiar with all the facts" of *Cioffi*.

Even if the facts were otherwise and Respondent's statement of the *Cioffi* case were accurate, it is clear that once an attorney is granted full immunity, his refusal thereafter to testify would unquestionably be contemptuous and in bad faith. Such is not the case here. It is undisputed that Petitioner's privileged refusal to answer questions was neither contemptuous nor in bad faith. Indeed the Appellate Division which disbarred Petitioner stated in its opinion that Petitioner acted in good faith. In addition, Petitioner, unlike *Cioffi*, was never granted immunity nor indeed could immunity have been conferred in an inquiry of this sort under the pertinent immunity statute, New York Penal Law, §2447.

## III.

**Respondent's tactics have circumvented Petitioner's constitutional right to due process of law.**

One shudders to think how many times it has been argued that law enforcement authorities cannot do their job if this Court wilfully persists in protecting the rights of individuals. That policemen may so believe, although lamentable, is not surprising. That attorneys should embrace this benighted view is shocking. And yet, unfortunately, Respondent has conducted the proceeding against Petitioner as though the *summum bonum* in our society was to "get" ambulance chasers, no matter what the cost in terms of individual liberties. And all this despite the absence of one shred of evidence that Petitioner has ~~in fact~~ engaged in unlawful solicitation!

This brief has already pointed out how Respondent, before this very Court, has cited and quoted authorities out of context and how he has inaccurately stated the pertinent facts about the *Cioffi* case. Petitioner will not dwell on Respondent's obvious attempt to prejudice this Court by his reference to the totally irrelevant fact that Petitioner's one-time law partner had been jailed for solicitation. It is sufficient to point out that subsequently Petitioner was appointed to the New York Domestic Relations Court which appointment received the endorsement of three prominent bar associations with knowledge of this fact (See Main Brief, p. 5). Perhaps Petitioner should count himself fortunate that Respondent has not called him a "Fifth Amendment ambulance chaser", although one of the briefs, *amicus curiae*, comes perilously close to doing just that.

(See Brief, *Amicus Curiae*, of the Co-ordinating Committee on Discipline, p. 21.)

But it is Respondent's overreaching below that is most serious. Nowhere does Respondent deny that if he prevails here, he will have found a superb device for evading procedural safeguards which this Court has long sought to preserve. As Petitioner said in his Main Brief (p. 31), "The new procedure will be simple: summon the person whose license to practice law is sought to be revoked; make vague threats about possessing adverse information so that the target will be moved to assert his privilege against self-incrimination; then revoke the license because the licensee has failed to cooperate with the investigation. In this way the inconvenience of presenting a case against the intended victim can safely be avoided." And, says Respondent in POINT III of his Brief, so long as the perpetrator of this travesty is careful to give the victim notice of the date on which the inquisition is to be held, an opportunity to answer, sufficient warning that he is in a tight spot, and finally, a chance in the course of the ensuing disciplinary hearing to deny that he refused to answer, the requirements of due process are satisfied. It is of no moment, states Respondent, that this procedure deprives the accused of his right to a hearing on the charges of professional misconduct adverted to by his interrogator. It is irrelevant, says Respondent, that this technique leaves the evidence against the accused wholly undisclosed and unproved, the witnesses against him being thus insulated from revealing cross-examination.

In Petitioner's Main Brief, it is stated (p. 31): "That this is not an overdrawn picture of what occurred below is

best indicated by respondent's statement in his brief (p. 20) before the Appellate Division that it ~~was~~ cheaper and quicker to proceed in this manner than to incur the 'expenditure of time, energy and money' that would be necessary to make a case of professional misconduct against the petitioner."

Respondent has given further evidence in his Brief in this Court that the technique described above is not an exaggeration. Until receiving Respondent's Brief, Petitioner had assumed, however unreliable that information might be, that at least Respondent was sincere when he told Petitioner in the course of the Inquiry that, "... we have information that indicates your participation in professional misconduct . . . ." Now for the first time, Respondent suggests that the adverse information was inconsequential. He says that Petitioner was not being asked to meet undisclosed information from unknown sources, that in fact, "The prime source of information as to petitioner's activities was his own Statements of Retainer filed by him with the Appellate Division" (Respondent's Brief, p. 11). At another point, Respondent says, "Actually, the record discloses that *practically every question asked petitioner* had its basis in his own Statements filed with the court" (Id., p. 6) (Emphasis added).

Petitioner does not, of course, claim to know whether Respondent does or does not have information indicating his participation in professional misconduct. Petitioner had assumed until now that because Respondent said he did, he did. And Petitioner is bound to admit that although Respondent seems to suggest above that there were no unseen informers, at other points he gives exactly the oppo-

site impression. Thus, in Respondent's Brief (pp. 7, 32), he emphasizes the fact that "specific persons were *named* when petitioner was being examined" (Emphasis in the original). If this is intended, as it seems to be, to convey the impression that Respondent had at least named Petitioner's accusers, then Respondent is again misrepresenting the facts. Nowhere were the many persons referred to in Respondent's questions at the Inquiry identified as informers. In sum, Respondent's position now seems to be that Petitioner was not being called upon to meet evidence given by unseen informers because: (1) there were no informers against him; and (2) these non-existent informers were in fact identified.

Petitioner does not mean to suggest that Respondent deliberately set out here to subvert Petitioner's constitutional rights. Petitioner does mean to suggest that Respondent has been reckless of those rights and that the nature of the proceedings he has chosen to employ permit, indeed facilitate exactly that kind of recklessness. In this connection, it is not amiss to point out that although Respondent claims that the State desperately needed the answers to the questions asked of Petitioner, it is clear from the Record that Respondent plainly had much of the information he claimed to be seeking from Petitioner.

## IV.

**This Court's decisions in cases involving public employees are not pertinent to a determination of the rights of a private citizen to pursue his profession.**

In attempting to answer Petitioner's contention that cases involving the dismissal of public employees cannot validly be invoked where, as here, the issue concerns the permanent revocation of a private citizen's license to pursue his profession (Petitioner's Main Brief, Point III), Respondent's Brief states (p. 26):

"Can it rationally be said that the duty of an attorney vis-a-vis the court which admitted him and is chargeable with control over his professional conduct, is any less sacred than the duty to the public employer of a subway conductor (the *Lerner* case), a teacher (the *Beilan* case), or a policeman (the *Christal* case)? Is not the duty of the lawyer higher than any of these non-lawyers? And, is the public interest any less vital in the case of the attorney?

In the ultimate, the fundamental principle is the same, namely, that he who refuses to answer when, in the public interest, it is his duty to speak, must bear the consequences."

Respondent's questions completely miss the point. The State may fire a subway conductor for refusing to answer questions relevant to his employment not because the conductor has a "sacred" duty to be candid with his employer, but because an employer, even a public employer, may impose all sorts of limitations upon its employees that the State may not impose upon private citizens, even those holding licenses from the State. Petitioner's Main Brief (p.

35) supplies a number of examples. Under Respondent's "sacred" duty analysis, it would seem to follow that anything the State may demand of its employees, it may demand of attorneys and other licensees. And this is plainly not so.

All that *Lerner*, *Beilan* and *Christal* prove is that the State could fire from its payroll any State-employed attorney who refused to answer questions put to him by his superiors. They do not mean that that same attorney can be banished from the profession. Petitioner's view of the inapplicability of the public employee cases is firmly supported by decisions of the highest courts of the states of Florida, Illinois, Massachusetts, and before the instant case, even of New York. See Petitioner's Main Brief, pp. 36-39. Significantly, Respondent makes no effort to distinguish any of these authorities which clearly reject his position. Thus in *Florida v. Sheiner*, 112 So. 2d 571, the Supreme Court of Florida reaffirmed an earlier holding (82 So. 2d 657) that it was a denial of due process to disbar an attorney for refusing to testify in reliance on his constitutional privilege against self-incrimination, although the applicability of the public employees cases (*Beilan* and *Lerner*) was urged upon the court. Again, in *In re Holland*, 377 Ill. 346, 36 N.E. 2d 543, the Supreme Court of Illinois, in holding that the suspension of an attorney for assertion of the privilege constituted error, rejected the attempted analogy between the policeman (*Christal*) and the lawyer. Indeed, in *Matter of Ellis*, 282 N. Y. 435, 26 N.E. 2d 967, a unanimous New York Court of Appeals held that an attorney could not be disbarred for refusing to waive his constitutional privilege against self-incrimination, even though its own decision in *Cantelline v. McClellan*, 282 N. Y. 166,

25 N.E. 2d 972, then but a few weeks old, upholding the discharge of a policeman for the very same conduct was urged upon it in the identical argument that Respondent makes herein (See Petitioner's Main Brief, p. 38).

The difference between the public employee and the licensee is demonstrated most dramatically in the *Opinion of the Justices*, 332 Mass. 763, 126 N.E. 2d 100. There the Supreme Judicial Court of Massachusetts, having earlier held that teachers could constitutionally be barred from public employment for refusing to testify in reliance on their privilege against self-incrimination, held that they could not constitutionally be barred from private employment as teachers. The court regarded the distinction between public and private employment as "obvious", as it must be, especially to the court that uttered the much-quoted, "The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman." *McAuliffe v. New Bedford*, 155 Mass. 216. Thus the inapplicability of the string of cases involving public employees cited in Respondent's Brief, p. 11 is clearly demonstrated.

In the face of this mass of opposing authority cited by Petitioner, Respondent presses upon this Court his conception of "the public interest." Although the Supreme Judicial Court of Massachusetts has said that it is not in the public interest to force private school teachers to give up their constitutional rights if they would teach the young, although the Supreme Courts of Illinois and Florida, and even at one time the Court of Appeals of New York have said that it is not in the public interest to make attorneys trade their constitutional rights for the right to practice,

Respondent would have it otherwise. According to him, "It matters not whether the relationship is one of public employment so long as the 'public interest' is involved" (Respondent's Brief, p. 25).

On Respondent's analysis, then, *Lerner v. Casey*, turns on the fact not that Lerner was a public employee, but that the public has a vital interest in the disclosures of a subway worker.\* If this is the meaning of *Lerner v. Casey*, who is safe from the inquisitorial process? Is there any line of endeavor that does not impinge upon the "public interest" as much as that of a subway worker? Under Respondent's analysis, virtually anyone can be denied the right to pursue his life's calling if he refuses to answer the State's questions, no matter what the reason for his refusal and no matter what the context.

This case is obviously not the first in which a prosecutor has identified the trapping of his quarry with the public interest. Fortunately, Courts do have broader vision. Respondent has, of course, misconceived the true public interest. That interest is served by fair procedures, procedures that permit attorneys to be "unintimidated—free to think, speak and act as members of an independent Bar." *Konigsberg v. State Bar of California*, 353 U. S. 252, 273. See also *Cammer v. United States*, 350 U. S. 399, 406-07. The cherished ideal of an independent Bar would be unattainable if attorneys were as vulnerable to State power as public employees.

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\* This was not, it should be added, the view of New York's representatives in the *Lerner* case itself. The brief filed in behalf of Casey distinguished this Court's decision in *Konigsberg* by pointing out that no "employer-employee" relationship existed in *Konigsberg*. See Appellee's Brief therein, p. 19.

## V.

**A refutation of arguments advanced in the Brief, *Amicus Curiae*, of the Co-ordinating Committee on Discipline.**

For the most part, the Brief, *Amicus Curiae*, of the Co-ordinating Committee follows the lines of argument advanced by Respondent. However, at pp. 19-21, it advances arguments not made by Respondent that should be disposed of.

**The pertinence of the *Konigsberg*, *Schware* and *Anastoplo* cases.**

The Co-ordinating Committee seeks to distinguish the instant case from the problems presented by *Konigsberg*, *Anastoplo* and *Schware*, on three grounds. First, those cases deal with political beliefs, whereas this one does not. Second, "*Konigsberg*, *Anastoplo* and *Schware* deal with alleged arbitrary refusals of admission to the Bar while Petitioner's case deals with a Judicial Inquiry, not arbitrarily conducted, into Petitioner's continued fitness to practice in view of his lack of candor with the Court as regards the subject of improper handling of personal injury cases." And, third, "Significantly a search of the records in the *Konigsberg*, *Anastoplo* and *Schware* cases indicates that none of the Petitioners in those cases took the privilege against self-incrimination."

To take the arguments in the reverse order, Petitioner agrees that the fact that his refusal was privileged, whereas those of *Konigsberg* and *Anastoplo* were not, is significant. He has suggested before that if the Bar authorities in

California and Illinois cannot rationally infer unfitness from Konigsberg's and Anastoplo's unprivileged refusals, it must follow, *a fortiori*, that the New York authorities cannot rationally infer unfitness from Petitioner's privileged refusal. That is to say, it follows, unless an assertion of the privilege against self-incrimination is to be taken as evidence of Petitioner's guilt, something that both Respondent and the courts below vigorously deny having done.

The Co-ordinating Committee's second argument, Petitioner frankly admits, he does not understand. If the Co-ordinating Committee is suggesting that Petitioner's case is weaker because he was already a member of the Bar in good standing with a long unblemished record behind him, whereas Anastoplo, Konigsberg and Schware are applicants for admission, reason and authority are unequivocally opposed to such a suggestion (See Petitioner's Main Brief, pp. 18-19). Is the Co-ordinating Committee saying that the other cases deal with alleged arbitrary refusals to admit, whereas this case deals only with a properly conducted Inquiry? If this case ended with the Inquiry, it would not be before this Court. But it did not end there. It went on to an arbitrary refusal to permit Petitioner to continue to practice law.

Finally, Petitioner fails to see how the fact that this case does not deal with political beliefs is important. Is there a doubt in the world that if New York may disbar Petitioner, it may disbar an attorney who refuses in reliance upon his privilege against self-incrimination to answer questions concerning whether he is a communist, anarchist or fascist? Is it not even more important to remove

alleged subversives from positions of public trust than alleged ambulance chasers? Would not a refusal to answer such questions be just as much a "lack of candor" as Petitioner's refusals? The proof of the essential identity between the instant case and a case involving alleged subversives lies completely and irrefutably in the fact that the very cases upon which Respondent relies most heavily—the public employee cases—involved exactly the kind of political inquiries now claimed to be unaffected by what happens to Petitioner. In fact, in Florida the Bar authorities attempted to disbar an attorney for a privileged refusal concerning his political beliefs. The American Bar Association therein (also *Amicus* herein) strongly urged disbarment, failing to see the distinction attempted here by the Co-ordinating Committee. Twice the Supreme Court of Florida refused to disbar, holding as Petitioner herein contends, that this would be a clear denial of due process. See *Sheiner v. Florida*, 82 So. 2d 657; *Florida v. Sheiner*, 112 So. 2d 571. The court significantly noted in *Sheiner*, that proof of the attorney's membership in the Communist Party would constitute professional misconduct, but steadfastly held that disbarment on the basis of his privileged refusal without more denied the attorney due process.

**The "threatening" of Petitioner with undisclosed evidence.**

The Co-ordinating Committee maintains, first, that Petitioner was not "threatened in any way" during the Inquiry and that, "This particular claim is here made for the first time, and was not made below."

Petitioner does not wish to quarrel with the Co-ordinating Committee over how Respondent's statement that, "... we have information that indicates your participation in professional misconduct . . ." should be characterized. It appeared, and naturally it would seem, threatening to Petitioner.

With respect to the claim that the point was not raised below, it is only necessary to quote the following passages from Petitioner's Brief before the New York Court of Appeals:

"If there is any evidence of professional misconduct by appellant, the fair way to proceed is to institute disciplinary proceedings on the basis of that evidence. That is a very different procedure from summoning appellant to a secret inquiry, presenting no charges, informing him that there is evidence against him, but not telling him what it is, thereafter depriving him of his livelihood because he failed to give testimony that may tend to incriminate him. Can appellant possibly be blamed for keeping silent under such circumstances?" (p. 22)

"However, at the inquiry appellant was for the first time informed that the inquiry had information indicating misconduct on his part . . . and the line of questioning to which appellant was subjected belied the disclaimer that appellant had not been summoned as a target of the inquiry" (pp. 31-32)

"Respondent would thus have found a convenient device by which to avoid the necessity of proving substantive charges of professional misconduct at a hearing at which it would have the burden of proof. It need only summon an attorney to a preliminary investigation, require him to submit to interrogation, and merely because he insists that

respondent produce the unseen accusers so that their veracity may be put to the test by confrontation and cross-examination, proceed to disbar him." (p. 35)

#### **Fifth Amendment ambulance chasing.**

• The Co-ordinating Committee Brief (p. 21) states:

"No lawyer will be heard to suggest seriously that the price of 'fearless advocacy' is a constitutionally protected right to solicit personal injury claims, 'chase ambulances', bribe police officers and ambulance attendants, breach the Canons of Ethics and violate the Penal Law of the State of New York, free from disciplinary limits or supervision."

*For the benefit of the Co-ordinating Committee, Petitioner will say again that not a scintilla of evidence that he has done any of the things listed has yet been presented or proven, unless, of course, one takes his assertion of the privilege against self-incrimination as a confession of guilt. And, once again, that is what Respondent and the courts below have said they have not done.*

#### **The effect on the Bar if this Court holds New York's action here unconstitutional.**

Finally, the Co-ordinating Committee, like Respondent, sees the Bar "headed downward at a precipitous rate" (p. 23) if a man who asserts and defends a constitutional privilege is permitted to remain in the profession. Petitioner has already responded to this extravagant prediction, but it seems appropriate to cite the Co-ordinating Committee's own Brief (p. 38), by way of supplying the answer: "We need the cooperation of those we call on. We may not get it at all times. It only means that we have to

work a little harder, a little longer." A small price to pay for the preservation of fundamental constitutional liberties.

Two other items should not be left unanswered.

1. The Co-ordinating Committee, as does the Respondent, refers to the fact, irrelevant here, that Petitioner's one-time law partner was jailed for solicitation in 1955 (pp. 9-10). Petitioner fails to see the reason for this, unless it is aimed at prejudicing this Court through some theory of guilt by association. It is sufficient to point out that in 1958, with knowledge of this fact, the Association of the Bar of the City of New York and the New York County Lawyers Association, two of the three creators of the Co-ordinating Committee, endorsed Petitioner as fit to serve as Judge of the Domestic Relations Court.\*

2. The Co-ordinating Committee refers in its Brief (p. 16) to the case of *Matter of Nathaniel Cohen*, 115 App. Div. 900 (1st Dept.) in support of the proposition that where

\* The Co-ordinating Committee Brief (p. 14) refers also to the "McCormick" Retainer annexed to Respondent's Brief, and states that Rothenberg's name appears therein "as the referrer of the client to Petitioner, although Rothenberg was in jail at the time of the claimed referral." Again, the reason for the inclusion of this item is unclear. Respondent concedes that the sole ground for disbarment was Petitioner's refusal to testify and that no proof of professional misconduct was adduced against him at a disciplinary proceeding, thus this item is clearly irrelevant. In addition, if the Co-ordinating Committee intends to give this Court the impression that Petitioner lied as to the identity of the referrer because Rothenberg was in jail at the time, it appears from Respondent's Brief (p. 8), although outside the Record, that McCormick was a prison guard. Again, these references in both Briefs are clearly irrelevant and it can only be supposed that the sole motive for their inclusion was to prejudice this Court and obfuscate the actual fact that there was no evidence ever proven against Petitioner of professional misconduct and that the sole ground for disbarment was his privileged refusal to testify.

the facts are undisputed there need be no hearing. Thus the Brief quotes from the case as follows:

"Upon this application to disbar the respondent, Nathaniel Cohen, we have reached the conclusion that as the facts are undisputed, we should dispose of the question presented without a reference."

In view of the fact that the opinion in that case was not published, it is surprising that the Co-ordinating Committee fails to inform this Court, that the issue before the court in that case was identical to the one presented herein, but that unlike the courts below, in that case the court held that an attorney's refusal to testify in reliance on his privilege against self-incrimination was not professional misconduct since the privilege is "as available to a lawyer as to a layman", and its invocation cannot support a disbarment.

## CONCLUSION

When all is said and done, this Court must decide whether the State can, consonant with due process, permanently deprive an individual of the right to practice his profession, although not a scintilla of evidence has been presented to impeach his good moral character, solely because he has refused to testify at a secret investigation in reliance in good faith on his privilege against self-incrimination.

Respondent has suggested that Petitioner misunderstands the nature of the decision below. He says: "In this Court, as in the New York State courts, petitioner persists in asserting that he was disciplined for invoking his constitutional privilege against self-incrimination." Respondent's Brief (p.22). Respondent reminds Petitioner that it

is not Petitioner's reliance on his privilege that has cost him his right to practice, but his refusal, "without more, to answer relevant questions posed by a state judicial inquiry . . . ." (Id. p. 21).

It is precisely this principle that Petitioner is attacking. Respondent and the courts below have failed to recognize that the context of the refusal cannot be disregarded, that a refusal to testify in admittedly good faith reliance on one's privilege against self-incrimination is not the same as a contemptuous refusal to testify. As Petitioner demonstrated in his Main Brief (pp. 22-23), there are many situations in which a refusal to testify is not only defensible, but the only rational course to pursue. And so it was here.

Thus, Petitioner differs not at all with Respondent over what the courts below held. He differs only in believing those holdings to be arbitrary in that they treat alike contemptuous refusals and privileged refusals, refusers whose character has not been impeached and those against whom evidence has been adduced, refusals in secret inquisitorial proceedings and refusals in proceedings where the right of confrontation, cross-examination and other procedural safeguards exist.

The State's power to bar a man from his chosen profession for the rest of his life is an awesome power. This power cannot be wielded in disregard of basic constitutional rights. A breach of the dike here will inevitably produce the flood that drowns individual rights in "the public interest," a term used repeatedly by Respondent to justify his tactics in this case. As Professor Gellhorn has so persuasively put it, "The incautious discarding of one constitutional protection cheapens others as well, for the erosion of values

is a process not easy to halt." Gellhorn, *Individual Freedom and Governmental Restraints*, pp. 139-40.

This Court stated many years ago in *Ex Parte Robinson*, 19 Wall. 505, 512:

"Before judgment disbarring a lawyer is rendered he should have notice of the grounds of complaint against him and ample opportunity of explanation and defence. This is a rule of natural justice, and should be equally followed when proceedings are taken to deprive him of his right to practice his profession, as when they are taken to reach his real or personal property. . . . The principle that there must be citation before hearing, and hearing or opportunity to be heard before judgment, is essential to the security of all private rights. Without its observance no one would be safe from oppression wherever power may be lodged."

Respondent's tactics herein and the resultant disbarment of the Petitioner make a mockery of the noble passage by this Court quoted above.

Dated: October 29, 1960.

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# SUPREME COURT OF THE UNITED STATES

No. 84.—OCTOBER TERM, 1960

Albert Martin Cohen, Petitioner,

v.  
Dennis M. Hurley.

On Writ of Certiorari to  
the Court of Appeals  
of the State of New  
York.

[April 24, 1961.]

MR. JUSTICE HARLAN delivered the opinion of the Court.

We are called upon to decide whether the State of New York may, consistently with the Fourteenth Amendment, disbar an attorney who, relying on his state privilege against self-incrimination, has refused to answer material questions of a duly authorized investigating authority relating to alleged professional misconduct.<sup>1</sup>

The issue arises in the context of the so-called Brooklyn "ambulance chasing" Judicial Inquiry which this Court had before it in *Anonymous v. Baker*, 360 U. S. 287. The origins, authority, and nature of the Inquiry have already been sufficiently described in our opinion in that case:

N. Y. Const., Art. I, § 6. While petitioner, at his appearance before the investigating authority, also claimed a federal privilege not to testify, in his later response to the petition initiating disciplinary proceedings he relied solely upon "the privilege against self-incrimination guaranteed to all persons, lawyers or laymen alike, under Article I Section 6 of the New York State Constitution." It is of course settled that a Fifth Amendment privilege was not available to petitioner in the present case. See, e. g., *Knapp v. Schweitzer*, 357 U. S. 371; *Lerner v. Casey*, 357 U. S. 468, 478. Nor do we understand it to be contended that the Fourteenth Amendment automatically precluded the State from exacting petitioner's testimony and attaching consequences to his refusal to respond. Cf. *Adamson v. California*, 332 U. S. 46, 54; *Palko v. Connecticut*, 302 U. S. 319, 323-324; *Twining v. New Jersey*, 211 U. S. 78, 110-114. We take the petitioner's position and the remittitur of the Court of Appeals as presenting under the Fourteenth Amendment only a broad claim of fundamental unfairness.

There need only be added here that the purpose of the Inquiry, as reflected in the establishing order of the Appellate Division of the Supreme Court of the State of New York, Second Department, was twofold: "to expose all the evil practices [involved in the improper solicitation and handling of contingent-retainers in personal injury cases] with a view to enabling this court to adopt appropriate measures to eliminate them and to discipline those attorneys found to have engaged in them." 9 A. D. 2d 436, 437.

For some years the Second Department has had a court rule "which requires that an attorney who makes contingent-fee agreements for his services in personal injury, wrongful death, property damage, and certain other kinds of cases, must file such agreements with the [Appellate Division] and, if he enters into five or more such agreements in any year, must give to the court in writing certain particulars as to how he came to be retained" (called "Statements of Retainer"). 7 N. Y. 2d 488, 493; see Rule 3 of the Special Rules Regulating the Conduct of Attorneys and Counselors at Law in the Second Judicial Department, Clevenger's Practice Manual, p. 21-19 (1959). Principally as a result of the large number of Statements of Retainer filed by him during recent years, petitioner was called to testify and produce records before the Justice in charge of the Inquiry.<sup>2</sup> Relying on his concededly available state privilege against self-incrimination, petitioner refused to produce the records called for

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<sup>2</sup> The following quotation from the respondent's brief accurately reflects the record:

"During the period 1954 to 1958, inclusive, pursuant to the provisions of said Rule, petitioner, a specialist in negligence cases, filed 228 statements as to retainer in his own name. In addition, 76 such statements were filed in the firm name of Cohen & Rothenberg, thus indicating that petitioner and his law firm had been retained on a contingent basis in a total of 304 negligence cases in five years (R. 33-35). The inquiry therefore deemed it advisable to call petitioner as one of its witnesses."

and to answer some sixty other questions. The subject matter of such questions was summarized by the New York Court of Appeals in its opinion in this case (7 N. Y. 2d 488, 494), as follows:

" . . . Those unanswered questions related to the identity of his law office partners, associates and employees, to his possession of the records of the cases described in his statements of retainer, to any destruction of such records, to his bank accounts, to his paying police officers or others for referring claimants to him, to his paying insurance company employees for referring cases to him, and to his promising to pay to any 'lay person' 10% of recoveries or settlements. He was asked—and refused to answer—as to whether he had made or agreed to make such payments to any of several named persons, as to whether he had hired or paid non-lawyers to arrange settlements of his case with insurance companies and as to whether his partner or associate Rothenberg had been indicted for and had pleaded guilty to violations of sections 270-a and 270-d of the Penal Law which forbid the solicitation of legal business or the employment of lawyers of such solicitors. . . ."

After petitioner had refused to answer these questions, counsel for the Inquiry warned him that "serious consequences," in the form of an exercise of the Appellate Division's disciplinary power over attorneys practicing before it,<sup>3</sup> might flow from his refusal to respond, even though that refusal was based on a claim of privilege. As the basis for his warning counsel referred to various provisions of the Canons of Professional Ethics<sup>4</sup> and of the

<sup>3</sup> Section 90 of the New York Judiciary Law.

<sup>4</sup> . . . Canon 22 . . . requiring lawyers to be candid and frank when before the court, Canons 28 and 29 forbidding the payment of awards to persons bringing in legal business and requiring lawyers

New York Penal Law. Petitioner was then given a further opportunity to respond to the unanswered questions, but he declined, preferring to rely upon his claim of privilege.

Thereafter the Justice in charge of the Inquiry recommended to the Appellate Division that petitioner be disciplined. The Appellate Division ordered respondent Hurley to file a petition for disciplinary action. The ensuing petition sought petitioner's disbarment, alleging as grounds therefor:

"The refusal of . . . Albert Martin Cohen, to produce the records [called for by the Inquiry], and his refusal to answer the questions [summarized above], are in disregard of and in violation of the inherent duty and obligation of respondent as a member of the legal profession in that, among other things, such refusals are contrary to the standards of candor and frankness that are required and expected of a lawyer to the Court; such refusals are in defiance of and flaunt [sic] the authority of the Court to inquire into and elicit information within respondent's knowledge relating to his conduct and practices as a lawyer; by his refusal to answer the aforesaid questions the respondent hindered and impeded the Judicial Inquiry that was ordered by this Court; by his refusals respondent withheld vital information bearing upon

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knowing of such practices to inform the court thereof, Canon 34 outlawing division of fees except with other lawyers . . ." 7 N. Y. 2d 488, 494. Canons 29 and 34 of the New York Canons of Professional Ethics are found in McKinney N. Y. Laws, Judiciary Law, pp. 774-775. Canons 22 and 28 are found in the 1959 "pocket part," at pp. 210-211. They are similar in all respects to the correspondingly numbered Canons of Professional Ethics of the American Bar Association.

<sup>5</sup> N. Y. Pen. Law §§ 270-a, 270-c, 270-d, 276, "all relating to soliciting and fee splitting." 7 N. Y. 2d 488, 494.

his conduct, character, fitness, integrity, trust and reliability as a member of the legal profession . . .

The Appellate Division ordered petitioner disbarred saying (9 A. D. 2d, 448, 449):

"To avoid any possible doubt as to our position, we state again that the basis for any disciplinary action by this court is, not the fact that respondent has invoked his constitutional privilege against self incrimination, but rather the fact that he has deliberately refused to co-operate with the court in its efforts to expose unethical practices and in its efforts to determine incidentally whether he had committed any acts of professional misconduct which destroyed the character and fitness required of him as a condition to his retention of the privilege of remaining a member of the Bar."

The New York Court of Appeals affirmed, Judge Fuld dissenting.<sup>6</sup> 7 N. Y. 2d 488. We granted certiorari because the case presented still another variant of the issues arising in the *Konigsberg* and *Anastaplo* cases. *Ante*, pp. —, —.

Starting from the undeniably correct premise that a State may not arbitrarily refuse a person permission to practice law, *Konigsberg v. State Bar of California*, 353 U. S. 252; *Schwartz v. Board of Bar Examiners*, 353 U. S. 232, petitioner's claim that New York's disbarment of him was capricious rests essentially on two propositions: (1) that the Fourteenth Amendment forbade the State from making his refusal to answer the Inquiry's questions a *per se* ground for disbarment; (2) that in any event such a ground is not permissible when refusal to answer rests on a *bona fide* claim of a privilege against self-incrimination.

<sup>6</sup> Judge Fuld dissented on state constitutional grounds, reaching no federal questions.

## I.

The first contention must be rejected largely in light of our today's opinions in the *Konigsberg* and *Anastaplo* cases, *ante*, pp. —, —. The fact that such refusal was here made a ground for disbarment, rather than for denial of admission to the bar, as in *Konigsberg* and *Anastaplo*, is not of constitutional moment. And there is no claim here either that the unanswered questions were not material or that petitioner was not duly warned of the consequences of his refusal to answer. By the same token those cases also dispose of petitioner's basically similar contention that the State could proceed against him only by way of independent evidence of wrongdoing on his part.

We do not think it can be seriously contended that New York's judicial inquiry was so devoid of rational justification that the mere act of compelling even unprivileged testimony was a deprivation of petitioner's liberty without due process. History and policy combine to establish the presence of a substantial state interest in conducting an investigation of this kind. That interest is nothing less than the exertion of disciplinary powers which English and American courts (the former primarily through the Inns of Court) have for centuries possessed over members of the bar, incident to their broader responsibility for keeping the administration of justice and the standards of professional conduct unsullied. Not only is the practice of such judicial investigations long-established, but the subject matter of the present investigation does not lack a rational basis. It is no less true than trite that lawyers must operate in a three-fold capacity, as self-employed businessmen as it were, as trusted agents of their clients, and as assistants to the court in search of a just solution to disputes. It is certainly not beyond the realm of permissible state concerns to conclude that too

much attention to the business of getting clients may be incompatible with a sufficient devotion to duties which a lawyer owes to the court, or that the "payment of awards to persons bringing in legal business" is inconsistent with the personally disinterested position a lawyer should maintain.

Finally, it cannot, by any stretch be considered that New York acted arbitrarily or irrationally in applying the disciplinary sanction of disbarment to the petitioner. What Mr. Justice Cardozo (then Chief Judge of the New York Court of Appeals) said in the *Karlin* case is enough to put an end to that contention:

"If a barrister was suspected of misconduct, the benchers of his inn might inquire of his behaviour. We can hardly doubt that refusal to answer would have been followed by expulsion. There was thus little occasion for controversies as to discipline to be brought before the judges unless the benchers failed in the performance of their duties. In case they did fail a supervisory power was ever in reserve. The inns . . . were subject . . . to visitation by the judges . . . . Short shrift would there have been for the barrister who refused to make answer as to his professional behavior in defiance of the visitors."  
248 N. Y., at 472-473.

If more than long-lived practice is thought necessary to justify such a sanction, it is to be found in the fact that the denial of continued access to a position that can be misused is permissible to assure that the position may not be held without observance of the obligations lawfully imposed upon it. Revocation of a license for failure to fulfill similar obligations of a licensee is the very sanction which the Federal Government has adopted in a number of situations. See, 12 U. S. C. § 481, 47 U. S. C. §§ 308 (b), 312 (a) 4.

## COHEN v. HURLEY.

### II.

A different constitutional conclusion does not result from the fact that petitioner's refusal was based on a good-faith assertion of his state privilege against self-incrimination. Because, from a federal standpoint, there can be no doubt that a State has great leeway in defining the reach of its own privilege against self-incrimination, we regard the scope of federal review here as being limited to the question whether arbitrary or discriminatory state action can be found in the consequences New York has attached to the exercise of the privilege in this instance.

Basic to consideration of this aspect of petitioner's case is the fact that the State's disbarment order was predicated not upon any unfavorable inference which it drew from petitioner's assertion of the privilege, cf. *Slochower v. Board of Higher Education*, 350 U. S. 551, 557-558; *Grunewald v. United States*, 353 U. S. 391, 421, nor upon any purpose to penalize him for its exercise, but solely upon his refusal to discharge obligations which, as a lawyer, he owed to the court. The Court of Appeals stated:

"Of course, [petitioner] had the right to assert the privilege and to withhold the incriminating answers. That right was his as it would be the right of any citizen and it was not denied to him. He could not be forced to waive his immunity. . . . But the question still remained as to whether he had broken the 'condition' on which depended the 'privilege' of membership in the Bar. . . . 'Whenever the condition is broken, the privilege is lost' [citing *Matter of Rouss*, 221 N. Y. 81, 84-85, Cardozo, J.]. Appellant as a citizen could not be denied any of the common rights of citizens. But he stood before the inquiry and before the Appellate Division in another quite different capacity, also. As a lawyer he was 'an officer of the court, and like the court itself, an instru-

ment . . . of justice' [citing *People ex rel. Karlin v. Culkan*, 248 N. Y. 465, 470-471, Cardozo, J.], with the inevitable consequences that the court which was charged with control and discipline of its officers had its own right to demand his full, honest and loyal co-operation in its investigations and to strike his name from the rolls if he refused to cooperate. 'Such co-operation' is a 'phrase without reality' as Chief Judge Cardozo wrote in *People ex rel. Karlin v. Culkan* (*supra*, p. 471) if a lawyer after refusing to answer pertinent questions about his professional conduct can retain his status and privileges as an officer of the court." 7 N. Y. 2d, at 495.

We do not think that it can be seriously contended that the unavailability of the state privilege in judicial inquiries of this type amounts to a distinction from criminal prosecutions so irrational as to suggest either a denial of due process or a purposeful discrimination of the kind which violates the Equal Protection Clause of the Fourteenth Amendment. A State may rationally conclude that the consequence of disbarment is less drastic than that of a prison term for contempt, albeit arguments to the contrary can be made as well. It may also rationally conclude that procedures resulting in greater preventive certainty are warranted when what is involved is the right to continue to occupy a position affording special opportunities for deleterious conduct—opportunities, indeed, created by the State's original certification of the petitioner's merit. In this regard all that New York has in effect held is that petitioner, by resort to a privilege against self-incrimination, can no more claim a right not to be disbarred for his refusal to answer with respect to matters within the competence of the Court's supervisory powers over members of the bar, than could a trustee claim a right not to be removed from office for failure to render accounts which might incriminate him. Finally, where illegal or shady practices on

the part of some lawyers are suspected, New York could rationally conclude that the profession itself need not be subjected to the disrespect which would result from the publicity, delay, and possible ineffectiveness in their exposure and eradication that might follow could miscreants only be dealt with through ordinary investigatory and prosecutorial processes. "If the house is to be cleaned, it is for those who occupy and govern it, rather than for strangers, to do the noisome work." *People ex rel. Karlin v. Culkin*, 248 N. Y. 465, 480 (Cardozo, J.).

These bases for affording a procedure in such judicial inquiries different from that in criminal prosecutions are more than enough to make wholly untenable a contention that there has here been either a denial of due process or of equal protection.

Although what has already been said disposes of this case, we take note, in conclusion, of two further considerations. First, it is suggested that the Fourteenth Amendment gave petitioner a federal constitutional right not to be required to incriminate himself in the state proceedings (although, apart from his claim of fundamental unfairness, the petitioner himself does not so contend, Note 1, *supra*). That proposition, however, was explicitly rejected by this Court, upon the fullest consideration, more than fifty years ago, *Twining v. New Jersey*, 211 U. S. 78,<sup>7</sup> and such has been the position of

<sup>7</sup> "Even if the historical meaning of due process of law and the decisions of this court did not exclude the privilege from it, it would be going far to rate it as an immutable principle of justice which is the inalienable possession of every citizen of a free government. Salutory as the principle may seem to the great majority, it cannot be ranked with the right to hearing before condemnation, the immunity from arbitrary power not acting by general laws, and the inviolability of private property. The wisdom of the exemption has never been universally assented to since the days of Bentham; many doubt it to-day, and it is best defended not as an unchangeable principle

the Court ever since.\* See *Snyder v. Massachusetts*, 291 U. S. 97; *Brown v. Mississippi*, 297 U. S. 278, 285; *Palko v. Connecticut*, 302 U. S. 319, 323-324; *Adamson v. California*, 332 U. S. 46; <sup>10</sup> *Knapp v. Schweitzer*, 357 U. S. 371, 374. This is not to say, of course, that States have free rein either in the choice of means of forcing incriminatory testimony, or in the drawing of inferences from

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of universal justice but as a law proved by experience to be expedient. See Wigmore, § 2251. It has no place in the jurisprudence of civilized and free countries outside the domain of the common law, and it is nowhere observed among our own people in the search for truth outside the administration of the law. It should, must and will be rigidly observed where it is secured by specific constitutional safeguards, but there is nothing in it which gives it a sanctity above and before constitutions themselves. Much might be said in favor of the view that the privilege was guaranteed against state impairment as a privilege and immunity of National citizenship, but, as has been shown, the decisions of this court have foreclosed that view. There seems to be no reason whatever, however, for straining the meaning of due process of law to include this privilege within it, because, perhaps, we may think it of great value. The States had guarded the privilege to the satisfaction of their own people up to the adoption of the Fourteenth Amendment. No reason is perceived why they cannot continue to do so. The power of their people ought not to be fettered, their sense of responsibility lessened, and their capacity for sober and restrained self-government weakened by forced construction of the Federal Constitution. . . ." 211 U. S., at 113-114.

\* Hence, if any "constitutional privilege against self-incrimination" has here been made a "phrase without reality" it can only have been a state privilege which this Court does not have jurisdiction to protect.

<sup>9</sup> "The privilege against self-incrimination may be withdrawn and the accused put upon the stand as a witness for the state." 291 U. S., at 105.

<sup>10</sup> "California follows Anglo-American legal tradition in excusing defendants in criminal prosecutions from compulsory testimony. . . . That is a matter of legal policy and not because of the requirements of due process under the Fourteenth Amendment." 332 U. S., at 54-55.

a refusal to testify on grounds of possible self-incrimination, no matter how objectionable or irrational. But these decisions do establish, at the very least, that to make out a violation of the Fourteenth Amendment, something substantially more must be shown than that the state procedures involved have a tendency to discourage the withholding of self-incriminatory testimony.

It is, however, suggested that such additional factors are to be found in New York's assertion of a power to grant a state privilege against self-incrimination without including within its sweep protection from disbarment of a lawyer who asserts this privilege during a judicial inquiry into his professional conduct. It is said that this gives rise to a pernicious doctrine whereby lawyers "may be separated into a special group upon which special burdens can be imposed even though such burdens are not and cannot be placed upon other groups."

This argument wholly misconceives the issue and what the Court has held respecting it. The issue is not, of course, *whether* lawyers are entitled to due process of law in matters of this kind, but, rather, *what* process is constitutionally due them in such circumstances. We do not hold that lawyers, because of their special status in society, can *therefore* be deprived of constitutional rights assured to others, but only, as in all cases of this kind, that what procedures are fair, what state process is constitutionally due, what distinctions are consistent with the right to equal protection, all depend upon the particular situation presented, and that history is surely relevant to these inquiries.<sup>11</sup> State banks may be sub-

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<sup>11</sup> Of course it is not alone the early beginning of the practice of judicial inquiry into attorney practices which is significant upon the reasonableness of what transpired here. Rather it is the long life of that mode of procedure which bears upon that issue, in much the same way that a strong consensus of views in the States is relevant

jected to periodic examinations that would violate the rights of some other kinds of business against unreasonable search and seizure. Compare 12 U. S. C. § 481 with *Boyd v. United States*, 116 U. S. 616. A state contractor can be deprived of even the rudiments of a hearing on the issue of whether the state executive department is contracting in accordance with applicable state law. Cf. *Perkins v. Lukens Steel Co.*, 310 U. S. 113. The "right" to judicial review of agency determinations can be taken away from railroad employees in one situation but guaranteed to professional employees in other situations. Compare *Switchmen's Union of North America v. National Mediation Board*, 320 U. S. 297, with *Leedom v. Kyne*, 358 U. S. 184. A state employee need no longer be entrusted with government property if he refuses to explain what has become of property with which he is charged though his refusal may be protected against a contempt sanction by a state or federal privilege against self-incrimination. Cf. *Lerner v. Casey*, 357 U. S. 468.

Clearly enough, factual distinctions are the determinative consideration upon the question of what process is due in each of these cases. Otherwise making state pro-

to a finding of fundamental unfairness. What is significant is that the practice we are now concerned with has survived the centuries which have seen the fall of all those iniquitous standards of which we are reminded, and which, incidentally, would be equally unconstitutional today if applied after a full criminal-type investigation and trial. While recognizing that the test was not exclusive, this Court stated many years ago:

"First, What is due process of law may be ascertained by an examination of those settled usages and modes of proceedings existing in the common and statute law of England before the emigration of our ancestors, and shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country. This test was adopted by the court, speaking through Mr. Justice Curtis, in *Murray v. Hoboken Land Co.*, 18 How. 272, 280. . . . " *Twining v. New Jersey*, *supra*, at 78, 100.

cedures vary solely on the basis of the given occupation would indeed be nothing less than a denial of equal protection to bankers, contractors, railroad employees, and government employees. On the basis of the factual distinctions that we have mentioned above, we consider that a State can constitutionally afford a different procedure—the present procedure—in these judicial investigations from that in criminal prosecutions.

Petitioner's disbarment is not constitutionally infirm, and the Court of Appeals' order must be

*Affirmed.*

# SUPREME COURT OF THE UNITED STATES

No. 84. — OCTOBER TERM, 1960.

Albert Martin Cohen, Petitioner,	{	On Writ of Certiorari to the Court of Appeals of the State of New York.
v.		
Denis M. Hurley.		

[April 24, 1961.]

MR. JUSTICE BLACK, with whom THE CHIEF JUSTICE and MR. JUSTICE DOUGLAS concur, dissenting.

We are once again called upon to consider the constitutionality of penalties imposed upon lawyers who refuse to testify before a secret inquiry being conducted by the State of New York into suspected unethical practices among members of the legal profession in and around New York City. In *Anonymous v. Baker*,<sup>1</sup> a majority of this Court upheld the power of New York to conduct such a secret inquiry. Here, the majority upholds the disbarment of petitioner, a New York lawyer for thirty-nine years, solely because, in reliance upon an assertion of his constitutional privilege against self-incrimination, he refused to testify before that inquiry. The theory upon which this order of disbarment was upheld by the New York Court of Appeals—a theory which the majority here embraces—is that although lawyers, as citizens, have a constitutional right not to incriminate themselves, they also have a special duty, as lawyers, to cooperate with the courts and that this “duty of co-operation” would become

<sup>1</sup> 360 U. S. 287. The majority there held that witnesses before the inquiry could constitutionally be deprived of a public hearing and the assistance of counsel. But cf. *Chambers v. Florida*, 309 U. S. 227, 237: “The determination to preserve an accused’s right to procedural due process sprang in large part from knowledge of the historical truth that the rights and liberties of people accused of crime could not be safely entrusted to secret inquisitorial processes.”

a "phrase without reality" . . . if a lawyer after refusing to answer pertinent questions about his professional conduct can retain his status and privileges as an officer of the court."<sup>2</sup> In my judgment, however, the majority is here approving a practice that makes the constitutional privilege against self-incrimination the "phrase without reality."

This almost magical obliteration of the privilege against self-incrimination represents a radical departure from the previously established practice in the State of New York. For, as pointed out in the dissent of Judge Fuld, the New York Court of Appeals had earlier condemned an attempt to introduce precisely the policy it here accepted, saying: "The constitutional privilege [not to incriminate one's self] is a fundamental right and a measure of duty; its exercise cannot be a breach of duty to the court." It follows that . . . the present disciplinary proceeding instituted against the appellant, wherein the single offense

<sup>2</sup> *Matter of Cohen*, 7 N. Y. 2d 488, 495.

In my judgment, petitioner's reliance upon his federal privilege against self-incrimination under the Fifth and Fourteenth Amendments is sufficiently shown by this whole record to require the consideration of that question by this Court. As the majority points out, petitioner expressly asserted that privilege before the court conducting the inquiry. Since that time it is true that he has not always spelled out with meticulous specificity this self-incrimination claim under the Fifth and Fourteenth Amendments, but he has consistently and repeatedly urged that his disbarment violates the Fourteenth Amendment. And the record shows throughout that the whole controversy has hinged around the question of the power of the State, under both the State and the Federal Constitutions, to force him to answer the questions he had been asked at the inquiry. Under these circumstances, I cannot allow to pass unnoticed the violation which I think has occurred with respect to petitioner's rights under the Fifth Amendment. Cf. *Boydton v. Virginia*, 364 U. S. 454, 457. While the Court seems to intimate an opposite view, its opinion appears to me actually to pass upon this federal contention.

charged is his refusal to yield a constitutional privilege, is unwarrantable."<sup>4</sup>

In departing from its prior policy of fully protecting the privilege against compelled self-incrimination guaranteed by both the State and the Federal Constitutions, the New York court relied heavily on several of this Court's recent cases.<sup>5</sup> Those cases, I regret to say, do provide some support for New York's partial nullification of the constitutional privilege against self-incrimination. For those cases are a product of the recently emphasized constitutional philosophy under which no constitutional right is safe from being "balanced" out of existence whenever a majority of this Court thinks that the interests of the State "weigh more" than the particular constitutional guarantee involved.<sup>6</sup> The product of the "balancing" here is the conclusion that the State's interest in disbarring any lawyer suspected of "ambulance chasing" outweighs the value of those provisions of our Bill of Rights and the New York Constitution commanding government not to make people testify against themselves. This is a very dubious conclusion, at least to one like me who believes that our Bill of Rights guarantees are essential to individual liberty and that they state their own

<sup>4</sup> *Matter of Grace*, 282 N. Y. 428, 435.

<sup>5</sup> 7 N. Y. 2d, at 496. "The cases relied upon were: *Lerner v. Casey*, 357 U. S. 468; *Beilan v. Board of Education*, 357 U. S. 399; *Nelson v. County of Los Angeles*, 362 U. S. 1.

<sup>6</sup> The majority has not even bothered expressly to "strike a balance" in these cases apparently on the theory that the value of the privilege against self-incrimination is so small that it can be "outweighed" by any countervailing governmental interest. See, e. g., *Nelson v. County of Los Angeles*, *supra*, at 7-8: "Nor do we think that this discharge is vitiated by any deterrent effect that California's law might have had on Globe's exercise of his federal claim of privilege. The State may nevertheless legitimately predicate discharge on refusal to give information touching on the field of security."

values leaving no room for courts to "weigh" them out of the Constitution. The First Amendment freedoms have already suffered a tremendous shrinkage from "balancing," and here the Fifth Amendment once again suffers from the same process.<sup>9</sup> I agree with MR. JUSTICE DOUGLAS that the order here under review is in direct conflict with the mandate of the Fifth Amendment as made controlling upon the States by the Fourteenth Amendment.<sup>10</sup>

In a less important area, I would be content to rest my dissent upon the single ground that a State may not penalize any person for invoking his constitutional privilege against self-incrimination. But, as I see this case, it involves other constitutional problems that go far beyond the privilege against self-incrimination—problems that

<sup>9</sup> My views of this "balancing" process have been set out at length in the companion cases, *Konigsberg v. State Bar of California*, decided today, *ante*, p. —, at —, —, and *In re Anastaplo*, decided today, *ante*, p. —, at —, —. See also the opinions cited at n. 10 in my dissenting opinion in *Konigsberg*.

<sup>10</sup> See, e. g., *Wilkinson v. United States*, 365 U. S. 399; *Braden v. United States*, 365 U. S. 431; *Times Film Corp. v. City of Chicago*, 365 U. S. 43; *Uphaus v. Wyman*, 364 U. S. 388; *Barenblatt v. United States*, 360 U. S. 109; *Uphaus v. Wyman*, 360 U. S. 72.

It is true that some inroads have already been made into the Fifth Amendment, for both *Lerner v. Casey*, *supra*, and *Nelson v. County of Los Angeles*, *supra*, rested partly upon a willingness of a majority of this Court to "balance" away the full protection of that Amendment.

<sup>11</sup> This conclusion is reached primarily on the basis of agreement with the dissenting opinion of Mr. Justice Harlan in *Twining v. New Jersey*, 211 U. S. 78, 114-127. But even if that case were rightly decided, it would not provide support for the decision here. For the issue with regard to the privilege against self-incrimination here is quite different from the issue posed in the *Twining* case. In that case the only question before the Court was whether comment upon a defendant's failure to take the stand in his own defense was constitutionally permissible.

involve dangers which, though as yet largely peculiar to the members of the legal profession, are so important that they need to be discussed. And, as I understand the majority's opinion, it disposes of those problems on a ground that, from the standpoint of the legal profession, is the most far-reaching possible—that lawyers have fewer constitutional rights than others. It thus places the stamp of approval upon a doctrine that, if permitted to grow, as doctrines have a habit of doing, can go far toward destroying the independence of the legal profession and thus toward rendering that profession largely incapable of performing the very kinds of services for the public that most justify its existence.

The unlimited reach of the doctrine being promulgated can best be shown by analysis of the issue before us as that issue was posed by the court below. In concluding that petitioner should be disbarred for reliance upon the privilege against self-incrimination, the New York Court of Appeals expressly recognized the right of every citizen, under New York law, to refuse to give self-incriminating testimony. "That right," the court said, "was his [petitioner's] as it would be the right of any citizen . . . ." But, the court reasoned, petitioner was more than an ordinary citizen. "[H]e stood before the inquiry and before the Appellate Division in another quite different capacity, also."<sup>11</sup> The capacity referred to was petitioner's capacity as a lawyer. In that "capacity," the court concluded, petitioner could not properly avail himself of his rights as a citizen. Thus it is clear that the theory adopted by the court below and reaffirmed by the majority here is that lawyers may be separated into a special group upon which special burdens can be imposed even though such burdens are not and cannot be placed upon other groups. Lawyers are thus to have their legal

<sup>11</sup> 7 N. Y. 2d, at 495.

rights determined by something less than the "law of the land" as it is accorded to other people.

In my judgment, the theory so casually but enthusiastically adopted by the majority constitutes nothing less than a denial to lawyers of both due process and equal protection of the laws as guaranteed by the Fourteenth Amendment. For I have always believed that those guarantees, taken together, mean at least as much as Daniel Webster told this Court was meant by due process of law, or the "law of the land," in his famous argument in the *Dartmouth College* case: "By the law of the land is most clearly intended the general law . . . . The meaning is, that every citizen shall hold his life, liberty, property, and immunities, under the protection of the general rules which govern society." <sup>12</sup> I think it is clear that the opinion of the majority in this case says unequivocally that lawyers may not avail themselves of "the general rules which govern society."

The majority recognizes, as indeed it must, that New York is depriving lawyers, because they are lawyers, of the full benefit of a constitutional privilege available to other people. But, instead of reaching the

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<sup>12</sup> *Dartmouth College v. Woodward*, 4 Wheat. 518, 581. See also *Vanzant v. Waddel*, 2 Yerger 260, in which Judge Catron, later Mr. Justice Catron, speaking for the Supreme Court of Tennessee, observed: "The right to life, liberty and property, of every individual, must stand or fall by the same rule or law that governs every other member of the body politic, or 'LAND,' under similar circumstances; and every partial or private law, which directly proposes to destroy or affect individual rights, or does the same thing by affording remedies leading to similar consequences, is unconstitutional and void." *Id.* at 270. The views expressed by Webster and Judge Catron go back at least as far as 1215 and Magna Charta, in which it was provided: "No free man shall be taken or imprisoned, or disseised, or outlawed, or exiled, or anywise destroyed; nor shall we go upon him nor send upon him; but by the lawful judgment of his peers or by the law of the land."

natural and, I think, obvious conclusion that such a singling out of one particular group<sup>13</sup> for special disabilities with regard to the basic privileges of individuals is in direct conflict with the Fourteenth Amendment,<sup>14</sup> it chooses to defend this patent discrimination against lawyers on the theory that there are no protections guaranteed to every man who, in the words of Magna Charta, is being "anywise destroyed" by the Government. The "law of the land" is therefore, in the view of the majority, an accordion-like protection that can be withdrawn from any person or group of persons whenever the Government might prefer "procedures resulting in greater certainty" if it can show some "reasonable" basis for that preference. The majority then proceeds to find such a "reasonable" basis on two grounds: first, that lawyers occupy a high position in our society "affording special opportunities for deleterious conduct" and can, by virtue of that position, be compelled to forego rights that are accorded to other groups; and, secondly, that the powers here exercised over petitioner by the courts of New York are no different than those exercised over lawyers by the courts of England several hundred years ago. In my judgment, neither of these grounds provides the slightest justification for the refusal of the State of New York to allow lawyers to avail themselves of "the general rules which govern society."

<sup>13</sup> I recognize, of course, that New York also singles out other groups for special treatment with regard to certain constitutional privileges. See *Barsky v. Board of Regents*, 347 U. S. 442. That practice, which I regard as also clearly unconstitutional (see my dissenting opinion in that case, *id.* at 456-467), does not affect the argument here. For discrimination against one group cannot be justified on the ground that it is also practiced against another.

<sup>14</sup> Cf. *Griffin v. Illinois*, 351 U. S. 12. In that case, we said: "In this tradition [the tradition of Magna Charta], our own constitutional guaranties of due process and equal protection both call for procedures in criminal trials which allow no invidious discriminations between persons and different groups of persons." *Id.* at 17.

I heartily agree with the view expressed by the majority that lawyers occupy an important position in our society, for I recognize that they have a great deal to do with the administration, the enforcement, the interpretation, and frequently even with the making of the Constitution and the other laws that govern us. But I do not agree with the majority that the importance of their position in any way justifies a discrimination against them with regard to their basic rights as individuals. Quite the contrary, I would think that the important role that lawyers are called upon to play in our society would make it all the more imperative that they not be discriminated against with regard to the basic freedoms that are designed to protect the individual against the tyrannical exertion of governmental power. For, in my judgment, one of the great purposes underlying the grant of those freedoms was to give independence to those who must discharge important public responsibilities. The legal profession, with responsibilities as great as those placed upon any group in our society, must have that independence. If it is denied them, they are likely to become nothing more than parrots of the views of whatever group wields governmental power at the moment. Wherever that has happened in the world, the lawyer, as properly so called and respected, has ceased to perform the highest duty of his calling and has lost the affection and even the respect of the people.

Nor do I believe, as the majority asserts, that the discrimination here practiced is justified by virtue of the fact that the courts of England have for centuries exercised disciplinary powers "over members of the bar, incident to their broader responsibility for keeping the administration of justice and the standards of professional conduct unsullied." The rights of lawyers in this country are not, I hope, to be limited to the rights that English rulers chose to accord to their barristers hundreds of years ago. For it is certainly true that the courts of England could have

then, as the majority points out, made "short shrift" of any barrister who refused to "co-operate" with the King's courts.\* Indeed, those courts did sometimes make "short shrift" of lawyers whose greatest crime was to dare to defend unpopular causes.<sup>15</sup> And in much the same manner, these same courts were at this same time using their "inherent" powers to make "short shrift" of juries that returned the wrong verdict.<sup>16</sup> History, I think, records that it was this willingness on the part of the courts of England to make "short shrift" of unpopular and unco-operative groups that led, first, to the colonization of this country, later, to the war that won its independence, and, finally to the Bill of Rights.<sup>17</sup>

<sup>15</sup> The following excerpt from Hallam, *The Constitutional History of England*, Vol. I (2d ed.), at 477, indicates the extent to which this sort of thing was done in seventeenth-century England: "Two puritans having been committed by the high-commission court, for refusing the oath ex-officio, employed Mr Fuller, a benchet of Gray's Inn, to move for their habeas corpus; which he did on the ground that the high commissioners were not empowered to commit any of his majesty's subjects to prison. This being reckoned a heinous offence, he was himself committed, at Baneroff's instigation, (whether by the king's personal warrant, or that of the council-board, does not appear) and lay in gaol to the day of his death."

<sup>16</sup> Hallam, *op. cit. supra*, n. 15, at 316, makes the following observation with regard to the duty of cooperation imposed upon English juries: "There is no room for wonder at any verdict that could be returned by a jury, when we consider what means the government possessed of securing it. The sheriff returned a panel, either according to express directions, of which we have proofs, or to what he judged himself of the crown's intention and interest. If a verdict had gone against the prosecution in a matter of moment, the jurors must have laid their account with appearing before the star-chamber, lucky, if they should escape, on humble retraction, with sharp words, instead of enormous fines and indefinite imprisonment."

<sup>17</sup> Judge Catron expressed the same point in *Vanzant v. Waddel*, *supra*: "The idea of a people through their representatives, making laws whereby are swept away the life, liberty and property of one or a few citizens, by which neither the representatives nor their other

When the Founders of this Nation drew up our Constitution, they were uneasily aware of this English practice, both as it had prevailed in that country and as it had been experienced in the colonies prior to the Revolution. Particularly fresh in their minds was the treatment that had been accorded the lawyers who had sought to defend John Peter Zenger against a charge of seditious libel before a royal court in New York in 1735.<sup>18</sup> These two lawyers had been summarily disbarred by the judges presiding at that trial for "having presumed, (notwithstanding they were forewarned by the Court of their displeasure, if they should do it) to sign, and having actually signed, and put into court, Exceptions, in the name of John Peter Zenger; thereby denying the legality of the judges their commissions . . . ." <sup>19</sup> It is to the lasting credit and renown of the colonial bar that Andrew Hamilton, a lawyer of Philadelphia, defied the hostility of the judges, defended and brought about the acquittal of Zenger.<sup>20</sup>

constituents are willing to be bound, is too odious to be tolerated in any government where freedom has a name. Such abuses resulted in the adoption of Magna Charta in England, securing the subject against odious exceptions, which is, and for centuries has been the foundation of English liberty. Its infraction was a leading cause why we separated from that country, and its value as a fundamental rule for the protection of the citizen against legislative usurpation, was the reason of its adoption as part of our constitution." 2 Yerger, at 270-271.

<sup>18</sup> See the Trial of John Peter Zenger, 17 Howell's State Trials, 675. Zenger, a newspaper publisher, had seen fit to criticize the government and was being tried for printing "many things derogatory of the dignity of his majesty's government, reflecting upon the legislature, upon the most considerable persons in the most distinguished stations in the province, and tending to raise seditions and tumults among the people thereof." *Id.*, at 678.

<sup>19</sup> *Id.*, at 686-687. The judges there preferred the label of "contempt" to that of "failure to co-operate."

<sup>20</sup> See Dictionary of American Biography, Vol. XX, at 648-649, for the story of Hamilton's successful defense of Zenger.

Unlike the majority today, however, the Founders were singularly unimpressed by the long history of such English practices. They drew up a Constitution with provisions that were intended to preclude for all time in this country the practice of "taking 'short shrift' of anyone—whether he be lawyer, doctor, plumber or thief. Thus, it was provided that in this country, the basic "law of the land" must include, among others, freedom from bills of attainder, from *ex post facto* laws and from compulsory self-incrimination, and rights to trial by jury after indictment by grand jury and to assistance of counsel.<sup>21</sup> To make certain that these rights and freedoms would be accorded equally to everyone, it was also provided: "No person shall . . . be deprived of life, liberty, or property, without due process of law."<sup>22</sup> (Emphasis supplied.) The majority is holding, however, that lawyers are not entitled to the full sweep of due process protections because they had no such protections against judges or their fellow lawyers in England. But I see no reason why this generation of Americans should be deprived of a part of its Bill of Rights on the basis of medieval English practices that our Forefathers left England, fought a revolution and wrote a Constitution to get rid of.<sup>23</sup> This Court

<sup>21</sup> Cf. *Chambers v. Florida*, 309 U. S. 227, 235-241, especially at 237, n. 10.

<sup>22</sup> That command, of course, originally applied only to the Federal Government. *Barron v. Baltimore*, 7 Pet. 243. But with the adoption in 1868 of the Fourteenth Amendment, the same command, together with the related requirement of equal protection of the laws, became binding upon the States.

<sup>23</sup> The majority asserts that it is not only "the early beginning of the practice of judicial inquiry into attorney practices . . . [but also] the long life of that mode of procedure" that justifies its decision here. This argument—that constitutional rights are to be determined by long-standing practices rather than the words of the Constitution—is not, as the majority points out, a new one. It lay at the basis of two of this Court's more renowned decisions—*Dred Scott v. Sandford*, 19 How. 393, and *Plessy v. Ferguson*, 163

should say here with respect to due process and self-incrimination what it said with respect to the freedoms of speech and press in *Bridges v. California*: "[T]o assume that English common law in this field became ours is to deny the generally accepted historical belief that 'one of the objects of the Revolution was to get rid of the English common law on liberty of speech and of the press.' " <sup>24</sup>

Instead of applying the reasoning of the *Bridges* case to protect the right of lawyers to avail themselves of the privilege against self-incrimination, the majority departs from that reasoning in an opinion that threatens also to restrict the freedoms of speech, press and association. For, in addition to the bare holding that a lawyer may not avail himself of the "law of the land" with respect to the privilege against self-incrimination, the opinion carries the plain implication that a lawyer is not to have the protection of the First Amendment with regard to his private beliefs and associations whenever his exercise of those freedoms might interfere with his duty to "co-operate" with a judge.<sup>25</sup> It is, of course, possible that the majority will allow this process to go no further—that it will not disturb the few remaining constitutional safeguards of the

U. S. 537. But cf. *Brown v. Board of Education*, 347 U. S. 483. "The notion that a violation of the plain language of the Constitution can gain legal stature by long-continued practice is not one I can subscribe to. A majority group, as de Tocqueville observed, too often 'claims the right not only of making the laws, but of breaking the laws it has made.'" De Tocqueville, *Democracy in America*, Vol. I, at 261.

<sup>24</sup> 314 U. S. 252, 264.

<sup>25</sup> This implication stems from the majority's reliance upon its opinions in the companion cases, *Konigsberg v. State Bar of California*, ante, p. —, and *In re Anastaplo*, ante, p. —. If, as the majority says, there is no constitutional difference between admission and disbarment proceedings, it seems clear that lawyers may now be called in by a State and forced to disclose their political associations on a penalty of disbarment if they refuse to do so.

lawyer's independence. But I find no such promise in the majority's opinion. On the contrary, I find in that opinion a willingness to give overriding effect to the lawyer's duty of "co-operation," even to the destruction of constitutional safeguards, and I cannot know how many constitutional safeguards would be sacrificed to this doctrine. Could a lawyer who refused to "co-operate" now be subjected to an unlawful search in an attempt to find evidence that he is guilty of something that a judge might later find to constitute "shady practices?"<sup>26</sup> Could the court peremptorily confine a lawyer in jail for contempt until he agreed to "co-operate" with the court by foregoing his privilege against self-incrimination—or renouncing his freedom of speech?<sup>27</sup> Or can American courts now emulate the one-time practice of English courts of sending lawyers to jail for the "crime" of publicly advocating the repeal of laws that require people to incriminate themselves?<sup>28</sup> If the requirements of due process and equal protection of the laws are observed, we know that the

<sup>26</sup> The same point was persuasively urged by Mr. Justice Floyd of the Florida Supreme Court in a concurring opinion where that court refused to adopt the rule adopted by the New York court in this case. See *Sheiner v. State*, 82 So. 2d 657, 664.

<sup>27</sup> As shown in notes 15 and 16, *supra*, the same arguments used to justify the decision in this case would also be applicable to the supposed case for it certainly cannot be denied that such a practice had the "sanction" of English history.

<sup>28</sup> Hallam, *op. cit.*, *supra*, n. 15, at 287, reports the following event in early seventeenth-century England: "The oath *ex officio*, binding the taker to answer all questions that should be put to him, inasmuch as it contravened the generous maxim of English law that no one is obliged to criminate himself, provoked very just animadversion. Morice, attorney of the court of wards, not only attacked its legality with arguments of no slight force, but introduced a bill to take it away. This was on the whole well received by the house; and sir Francis Knollys, the staunch enemy of episcopacy, though in high office, spoke in its favour. But the queen put a stop to the proceeding, and Morice lay some time in prison for his boldness."

answers to these questions would be, no. But who knows how short "short shrift" can get?

The majority says that some of the evil practices I have referred to do not exist today and that they would now be held unconstitutional. The Court does not mean, of course, that the people of this country have an "absolute" right not to be subjected to such practices.<sup>29</sup> It means rather that a majority of this Court, *as presently constituted*, thinks that such practices are not "justified on balance." But only 10 years ago, a different majority of this Court upheld summary imprisonment of the defense counsel in *Dennis v. United States*,<sup>30</sup> on a record which indicated that the primary reason for that imprisonment was the imputation to the lawyers of what the trial judge conceived of as the unpatriotic and treasonable designs of their clients.<sup>31</sup> Even more recently, a bare 5-4 majority of this Court prevented the temporary disbarment of a lawyer whose only "crime" lay in criticizing the manner in which the federal courts conduct trials for sedition.<sup>32</sup> And today, this Court is upholding the refusal of two States to admit lawyers to their respective Bars solely because those lawyers would not renounce their rights under the First Amendment.<sup>33</sup> The sad truth is that the majority is being usefully optimistic in thinking the practices I have mentioned do not exist today.

<sup>29</sup> This much is made indisputably clear in the majority opinion in *Konigsberg v. State Bar of California*, *supra*, at —.

<sup>30</sup> 341 U. S. 494.

<sup>31</sup> See *Sacher v. United States*, 343 U. S. 1, 19 (dissenting opinion). In my judgment the *Sacher* case is not altogether unlike the case of the lawyer Fuller discussed in n. 15, *supra*.

<sup>32</sup> *In re Sawyer*, 360 U. S. 621. Cf. Trial of John Peter Zenger, *supra*.

<sup>33</sup> *Konigsberg v. State Bar of California*, decided today, *supra*; *In re Anastaplo*, decided today, *supra*. The pressures being brought upon Konigsberg and Anastaplo are subtler than those brought upon such people as Morice (see note 28), but they are no less real.

They may have been disguised by description in different language but the practices themselves have not changed.

It seems to me that the majority takes a fundamentally unsound position when it endorses a practice based upon the artificial notion that rights and privileges can be stripped from a man in his capacity as a lawyer without affecting the rights and privileges of that man as a man. It is beyond dispute that one of the important ends served by the practice of law is that it provides a means of livelihood for the lawyer and those dependent upon him for support. That means of earning a livelihood is not one that has been conferred upon the lawyer as a gift from the State. Quite the contrary, it represents a substantial investment in time, money and energy on the part of the person who prepares himself to go into the legal profession. Moreover, even after a lawyer has been admitted to practice, a further substantial investment must be made to enable the lawyer to build up the sort of goodwill that lies at the root of any successful practice. Young lawyers must and do take on cases in which their ultimate fee is only a fraction of the real value of the work they put into the case in order to build up this sort of goodwill. The lawyer's abilities, acquired through long and expensive education, and the goodwill attached to his practice, acquired in part through uncompensated services, are capital assets that belong to the lawyer—both as a lawyer and as a man, assuming that such a conceptualistic distinction can be drawn.

These assets should be no more subject to confiscation than his home or any other asset he may have acquired through his industry and initiative. If they are used in violation of an already-existing, clear requirement of the law which pronounces as the penalty for violation confiscation of the assets, and if the violation is established in a proceeding in which all the requirements of the "law of

the land" are satisfied, that ~~one~~ thing. But to confiscate the earning capacity that represents a large part of a lawyer's lifetime achievements on the theory that no such asset exists is quite another. The theory that the practice of law is nothing more than a privilege conferred by the State which it can destroy whenever it can assert a "reasonable" justification for doing so seems to me to permit plain confiscation.

Even apart from the financial impact, the disbarment of a lawyer cannot help but have a tremendous effect upon that lawyer as a man. The dishonor occasioned by an official pronouncement that a man is no longer fit to follow his chosen profession cannot well be ignored. Such dishonor undoubtedly goes far toward destroying the reputation of the man upon whom it is heaped in the community in which he lives. And the suffering that results falls not only upon the disbarred lawyer but upon his family as well. Government certainly should not be allowed to do this to a man without according him the full benefit of the "law of the land," both constitutional and statutory.

Thus, I am in complete agreement with the majority that, on a constitutional level, it is certainly not beyond the realm of permissible state concerns to conclude that too much attention to the business of getting clients may be incompatible with a sufficient devotion to duties which a lawyer owes to the court, or that the payment of rewards to persons bringing in legal business is inconsistent with the personally disinterested position a lawyer should maintain. But that state concern in preventing "ambulance chasing" is certainly no greater than the state concern in preventing any other activity which it has seen fit to make a crime. Suspected "ambulance chasers" should be no more subject to the deprivation of due process and equal protection that stems from "procedures resulting in greater certainty" than are suspected murderers. Indeed, it seems to me that if the question is to be decided on the basis of "state concern," there is no more justification for applying such summary procedures to "ambulance chasing" than for applying them to any other variety of crime.

In view of all this, I can see no justification for the notion that membership in the bar is a mere privilege conferred by the State and is therefore subject to withdrawal for the "breach" of whatever vague and indefinite "duties" the courts and other lawyers may see fit to impose on a case-by-case basis.<sup>35</sup> Nearly a century ago, an English judge observed, correctly, I think, that "short of those heavy consequences which would attach to the greater and more heinous offences, I own I can conceive of no jurisdiction more serious than that by which a man may be deprived of his degree and status as a barrister, and which, in such a case—perhaps, after he has devoted the best years of his life to this arduous profession,—deprives him of his position as a member of that profession, and throws him back upon the world to commence a new career as best he may, stamped with dishonour and disgrace."<sup>36</sup> But that is precisely what is happening here on the basis of nothing more than petitioner's "failure to co-operate" with the courts by reliance upon his constitutional privilege against self-incrimination. A man who has devoted thirty-nine years of his life to the practice of law and who, so far as this record shows, has never failed to perform those services faithfully and honorably is being dismissed from the profession in disgrace and is having his means of livelihood taken away from him at a point in his life when it seems highly unlikely that he will be able to find an adequate alternative means to support himself.

Quite differently from the majority, I think that the legal profession not only can but should endure what the majority refers to as the "disrespect which would result from the publicity, delay, and possible ineffectiveness in their exposure and eradication that might follow could

<sup>35</sup> Cf. *Barshy v. Board of Regents*, *supra*, at 459, 472-474 (dissenting opinions).

<sup>36</sup> *Hudson v. Stodd*, 3 Foster and Emmons (Q. B.) 300, 411.

miscreants only be dealt with through *ordinary investigatory and prosecutorial processes*." (Emphasis supplied.) Indeed, I cannot understand how any man in this country can assume that "publicity," "delay" and "ineffectiveness" brought on by observance of due process of law can ever be disrespectful. I am not at all certain, however, that the legal profession can survive in any form worthy of the respect we want it to have if its internal intergroup conflicts over professional ethics<sup>37</sup> are not rigidly confined by just those "ordinary investigatory and prosecutorial processes" which, though belittled by the majority today, are enshrined in the concepts of equal protection and due process. For if the legal profession can, with the aid of those members of the profession who have become judges, exclude any member it wishes even though such exclusion could not be accomplished within the limits of the same kind of due process that is accorded to other people, how is any lawyer going to be able to take a position or defend a cause that is likely to incur the displeasure of the judges or whatever group of his fellow lawyers happens to have authority over him?<sup>38</sup> The answer is that in many cases he is not going to be able to take such a position or to defend such a cause and the public will be deprived of just those legal services that, in the past, have given lawyers their most bona fide claim to greatness.

<sup>37</sup> The true nature of the underlying controversy in this case, as a controversy between economically competing groups of lawyers, is shown by the fact that four different associations of attorneys filed *amicus curiae* in the present proceeding—two favorable to petitioner and two favorable to respondent.

<sup>38</sup> The immense danger of departures from due process to lawyers who represent unpopular causes is dramatically illustrated in *Sacher v. United States*, *supra*. Cf. *United States ex rel. Goldsby v. Harpole*, 263 F. 2d 71, 82, for a discussion of another situation in which the independence of the lawyer may be crucial to his ability adequately to defend his client.

It may be that petitioner has been guilty of some violation of law which if legally proved would justify his disbarment. It is only fair to say, however, that there is not one shred of evidence in this record to show such a violation. And petitioner is entitled to every presumption of innocence until and unless such a violation has been charged and proved in a proceeding in which he, like other citizens, is accorded the protection of all of the safeguards guaranteed by the requirements of equal protection and due process of law. This belief that lawyers too are entitled to due process and equal protection of the laws will not, I hope, be regarded as too new or too novel.

The great importance of observing due process of law, though to some extent familiar to lawyers and laymen alike, is sometimes difficult for laymen to understand. Courts have often had to rely upon lawyers and their familiarity with the wisdom underlying these processes to explain the need for time-consuming procedures to impatient laymen. Such impatience is understandable when it comes from laymen—but it is regrettable to find it in lawyers. The respect for a rule of law administered through due process of law is the very hallmark of a lawyer—without it he cannot keep faith with his profession.

# SUPREME COURT OF THE UNITED STATES

No. 84.—OCTOBER TERM, 1960.

Albert Martin Cohen, Petitioner,	} On Writ of Certiorari to the Court of Appeals of the State of New York.
<i>v.</i>	
Denis M. Hurley.	

[April 24, 1961.]

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BLACK concurs, dissenting.

The privilege against self-incrimination contained in the Fifth Amendment has an honorable history and should not be downgraded as it is today. Levi Lincoln, Attorney General, objected in the hearing of *Marbury v. Madison*, 1 Cranch 137, 144, to answering certain questions on the ground that the answers might tend to criminate him.<sup>1</sup> See Warren, *The Supreme Court in United States History* (1937), Vol. I, p. 237. The Court, then headed by Chief Justice Marshall, respected the privilege.<sup>2</sup> Neither he nor any Justice even intimated that it was improper for a lawyer to invoke his constitutional rights. They knew

<sup>1</sup> As reported in *The Aurora* for February, 1803, Levi Lincoln stated to the Court "[t]hat if the Court should upon the questions being submitted in writing determine that he was bound to answer them, another difficulty would suggest itself upon the principles of evidence; he would suppose the case to assume its most serious form, if in the course of his official duty these commissions should have come into his hands, that he might either by error or by intention have done wrong, it would not be expected he should give evidence to criminate himself. This was an extreme case and he used only to impress upon the Court the nature of the principle in the strongest terms."

<sup>2</sup> The Court, as reported in 1 Cranch, at 144, said that the Attorney General was not obliged "to state anything which would criminate himself."

that the Fifth Amendment was designed to protect the innocent as well as the guilty. What the Court did that day reflected the attitude expressed by the Court in 1956 in *Slochower v. Board of Education*, 350 U. S. 551, 557, 558, when we said, "The privilege against self-incrimination would be reduced to a hollow mockery if its exercise could be taken as equivalent either to a confession of guilt or a conclusive presumption of perjury. . . . The privilege serves to protect the innocent who otherwise might be ensnared by ambiguous circumstances."

The lawyer in this case is in the same need of that protection as was the Attorney General in *Marbury v. Madison* and the professor in the *Slochower* case.

The American philosophy of the Fifth Amendment was dynamically stated by President Andrew Jackson who replied as follows to a House Committee investigating the spoils system:

"You request myself and the heads of the Departments to become our own accusers, and to furnish the evidence to convict ourselves." H. R. Rep. No. 194, 24th Cong., 2d Sess., p. 31.

President Grant took long absences from Washington, D. C., for recreational purposes. A House resolution asked Grant to list all his executive acts, since his election, which had been "performed at a distance from the seat of government established by law," together with an explanation of the necessity "for such performance." Grant declined, stating that if the information was wanted for purposes of impeachment, "it is asked in derogation of an inherent natural right, recognized in this country by a constitutional guarantee which protects every citizen, the President as well as the humblest in the land, from being made a witness against himself."

Vol. 4, Cong. Rec., Pt. 3, 44th Cong., 1st Sess., p. 2999;  
H. Jour., 44th Cong., 1st Sess., p. 917.

A faithful account of the Fifth Amendment was given by Simon K. Rifkind, formerly a federal judge in the Southern District of New York who served with distinction from 1941 to 1950. He said in an address on May 3, 1954:

"Far and wide, currency has been given to what I regard as the mischievous doctrine, the unconstitutional and historically false doctrine that the plea of the Fifth Amendment is an admission of guilt, an act of subversion, a badge of disloyalty.

"I confess that when I hear the words 'Fifth Amendment Communist' spoken, I experience a sense of revulsion. In that phrase I detect a denial of seven centuries of civilizing growth in our law, a repudiation of that high regard for human dignity which is the proud hallmark of our law. That phrase makes a mockery of a practice of every court in our land—a practice which is so well-accepted that we take it for granted: Has any of you ever seen a prosecutor call a defendant to the witness stand? Of course not; you are shocked, I hope, at the suggestion. A defendant takes the stand only of his own free will. Nor do we speak of 'Fifth Amendment burglars,' 'Fifth Amendment traffic violators,' or 'Fifth Amendment anti-trust law violators.' Nor, for that matter, would I speak of 'Fifth and Sixth Amendment Senators.' But I do seem to recall that when the actions of a Senator recently came under investigation, he hastened to insure that he would have the right to confront and cross-examine his accusers. He

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Rifkind, *Reflections on Civil Liberties* (American Jewish Committee), pp. 12-13.

demanding that a statement of the charges be made available to him; and he insisted that he be allowed to compel the attendance of witnesses in his own behalf.

"This is not the time to go into the hoary history of the Fifth Amendment, but this much is clear: The privilege to remain silent was regarded by our ancestors as the inalienable right of a free man. To compel a man to accuse himself was regarded as a cruelty beneath the tolerance of civilized people, and it simply is not true as a matter of law that only the guilty are privileged to plead the Fifth Amendment. The innocent too have frequent occasion to seek its beneficent protection."

There is no exception in the Fifth Amendment for lawyers any more than there is for professors, Presidents, or other office holders.

I believe that the States are obligated by the Due Process Clause of the Fourteenth Amendment to accord the full reach of the privilege to a person who invokes it. See *Adamson v. California*, 332 U. S. 46, 68 (dissenting opinion); *Scott v. California*, 364 U. S. 471 (dissenting opinion)—a position which MR. JUSTICE BRENNAN today strengthens and reaffirms. In the disbarment proceedings, petitioner relied not only on the state constitution but on the Due Process Clause of the Fourteenth Amendment, contending that it forbade the State's making his silence the basis for his disbarment. I agree with that view. Moreover, apart from the Fifth Amendment, I do not think that a State may require self-immolation as a condition of retaining the license of an attorney. When a State uses petitioner's silence to brand him as one who has not fulfilled his "inherent duty and obligation . . . as a member of the legal profession," it adopts a procedure that does not meet the requirements of due process. Tak-

ing away a man's right to practice law is imposing a penalty as severe as a criminal sanction, perhaps more so. The State should carry the burden of proving guilt. The short-cut sanctioned today allows proof of guilt to be "less than negligible." *Gruncwald v. United States*, 353 U. S. 391, 424.

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MR. JUSTICE BRENNAN, with whom THE CHIEF JUSTICE joins, dissenting.

I would reverse because I think that the petitioner was protected by the immunity from compulsory self-incrimination guaranteed by the Fifth Amendment, which in my view is absorbed by the Fourteenth Amendment, and therefore is secured against impairment by the States.

In *Barron v. Baltimore*, 7 Pet. 243, decided in 1833, the Court held that it was without jurisdiction to review a judgment of the Maryland Court of Appeals which denied an owner compensation for his private property taken for public use. Chief Justice Marshall wrote that, contrary to the contention of the owner, "the provision in the fifth amendment to the constitution, declaring that private property shall not be taken for public use, without just compensation, is intended solely as a limitation on the exercise of power by the government of the United States, and is not applicable to the legislation of the states." This, he said, was because the first eight Amendments "contain no expression indicating an intention to apply them to the state governments. This Court cannot so apply them." 7 Pet., pp. 250-251. For over a quarter of a century after the adoption of the Fourteenth Amendment in 1869, this holding was influential in many decisions of the Court which rejected arguments for the application to the States of one after another of the

specific guarantees included in the Federal Bill of Rights. See *Knapp v. Schweitzer*, 357 U. S. 371, 378-379, note 5, where the cases are collected.

In 1897, however, the Court decided *Chicago, B. & Q. R. Co. v. Chicago*, 166 U. S. 226. That case also challenged the constitutionality of a judgment of a State Supreme Court, that of Illinois, alleged to have sustained a taking of private property for public purposes without just compensation. But the property owner could now invoke the Fourteenth Amendment against the State. The Court held that the claim based on that Amendment was cognizable by the Court. On the merits, the first Mr. Justice Harlan wrote, "In our opinion, a judgment of a state court, even if it be authorized by statute, whereby private property is taken for the State or under its direction for public use, without compensation made or secured to the owner, is, upon principle and authority, wanting in the due process of law required by the Fourteenth Amendment of the Constitution of the United States, and the affirmance of such judgment by the highest court of the State is a denial by that State of a right secured to the owner by that instrument." 166 U. S., p. 241. Thus the Court, in fact if not in terms, applied the Fifth Amendment's just-compensation requirement to the States, finding in the Fourteenth Amendment a basis which Chief Justice Marshall in *Barron* found lacking elsewhere in the Constitution.

But if suitors in state cases who invoked the protection of individual guarantees of the Bill of Rights were no longer to be turned away by the Court with Marshall's summary "We cannot so apply them," neither was the Court to give encouragement that all specifics in the federal list would be applied as was the Just Compensation Clause. Although there were Justices as early as 1892, see *O'Neil v. Vermont*, 144 U. S. 323, 337, 366 (dissenting opinions), as there are Justices today, see dissent of

MR. JUSTICE DOUGLAS herein and *Adams v. California*, 332 U. S. 46, 68 (dissenting opinion), urging the view that the Fourteenth Amendment carried over intact the first eight Amendments as limitations on the States, the course of decisions has not so far followed that view. Additional specific guarantees have, however, been applied to the States. For example, while as recently as 1922, *Prudential Ins. Co. v. Cheek*, 259 U. S. 530, 543, the Court had said that the Fourteenth Amendment did not make the protections of the First Amendment binding on the States, decisions since 1925 have extended against state power the full panoply of the First Amendment's protections for religion, speech, press, assembly, and petition. See, e.g., *Gitlow v. New York*, 268 U. S. 652, 666; *Cantwell v. Connecticut*, 310 U. S. 296, 303; *West Virginia State Board of Education v. Barnett*, 319 U. S. 624; *Near v. Minnesota ex rel. Olson*, 283 U. S. 697, 707; *DeJonge v. Oregon*, 299 U. S. 353, 364; *Bridges v. California*, 314 U. S. 252, 277. The view occasionally expressed that the freedom of speech and the press may be secured by the Fourteenth Amendment less broadly than it is secured by the First, see *Beauharnais v. Illinois*, 343 U. S. 250, 288 (dissenting opinion); *Roth v. United States*, 354 U. S. 476, 505-506 (separate opinion); *Smith v. California*, 361 U. S. 147, 169 (separate opinion), has never persuaded even a substantial minority of the Court. Again, after saying in 1914 that "the Fourth Amendment is not directed to individual misconduct of [state] . . . officials. Its limitations reach the Federal Government and its agencies," *Weeks v. United States*, 232 U. S. 383, 398, the Court held in 1949 that "[t]he security of one's privacy against arbitrary intrusion by the police . . . is . . . implicit in the concept of ordered liberty" and as such enforceable against the States . . . " *Wolf v. Colorado*, 338 U. S. 25, 27-28; and see *Elkins v. United States*, 364 U. S. 206.

This application of specific guarantees to the States has been attended by denials that this is what in fact is being done. The insistence has been that the application to the States of a safeguard embodied in the first eight Amendments is not made "because those rights are enumerated in the first eight Amendments, but because they are of such a nature that they are included in the conception of due process of law." *Twining v. New Jersey*, 211 U. S. 78, 99. In other words, due process is said to be infused with "an independent potency," not resting upon the Bill of Rights. *Adamson v. California*, 332 U. S. 46, 66 (concurring opinion). It is strange that the Court should not have been able to detect this characteristic in a single specific when it rejected the application to the States of virtually every one of them in the three decades following the adoption of the Fourteenth Amendment. Since "[f]ew phrases of the law are so elusive of exact apprehension as . . . [due process of law] . . . [and] . . . its full meaning should be gradually ascertained by the process of inclusion and exclusion in the course of the decisions of cases as they arise," *Twining v. New Jersey*, *supra*, at 99-100, this formulation has been a convenient device for leaving the Court free to select for application to the States some of the rights specifically mentioned in the first eight Amendments, and to reject others. But surely it blinks reality to pretend that the specific selected for application is not really being applied. Mr. Justice Cardozo more accurately and frankly described what happens when he said in *Palko v. Connecticut*, 302 U. S. 319, 326, that guarantees selected by the Court "have been taken over from the earlier articles of the federal bill of rights and brought within the Fourteenth Amendment by a process of absorption . . . ." (Italics supplied.)

Many have had difficulty in seeing what justifies the incorporation into the Fourteenth Amendment of the

First and Fourth Amendments which would not similarly justify the incorporation of the other six. Even if I assume, however, that, at least as to some guarantees, there are considerations of federalism—derived from our tradition of the autonomy of the States in the exercise of powers concerning the lives, liberty, and property of state citizens—which should overbear the weighty arguments in favor of their application to the States, I cannot follow the logic which applies a particular specific for some purposes and denies its application for others. If we accept the standards which justify the application of a specific, namely that it is “of the very essence of a scheme of ordered liberty,” *Palko v. Connecticut*, *supra*, p. 325, or is included among “those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions,” *Hurtado v. California*, 110 U. S. 516, 535, or is among those personal immunities “so rooted in the traditions and conscience of our people as to be ranked as fundamental,” *Snyder v. Massachusetts*, 291 U. S. 97, 105, surely only impermissible subjective judgments can explain stopping short of the incorporation of the full sweep of the specific being absorbed. For example, since the Fourteenth Amendment absorbs in capital cases the Sixth Amendment’s requirement that an accused shall have the assistance of counsel for his defense, *Powell v. Alabama*, 287 U. S. 45, I cannot see how a different or greater interference with a State’s system of administering justice is involved in applying the same guarantee in noncapital cases. Yet our decisions have limited the absorption of the guarantee to such noncapital cases as on their particular facts “render criminal proceedings without counsel so apt to result in injustice as to be fundamentally unfair . . .,” *Uveges v. Pennsylvania*, 335 U. S. 437, 441; see also *Betts v. Brady*, 316 U. S. 455. But see *McNeal v. Culver*, 365 U. S. 109, 117 (concurring opinion). This makes of the process of

absorption "a license to the judiciary to administer a watered-down, subjective version of the individual guarantees of the Bill of Rights when state cases come before us," which, I said in *Ohio ex rel. Eaton v. Price*, 364 U. S. 263, 275 (dissenting opinion), I believe to be indefensible.

The case before us presents, for me, another situation in which the application of the full-sweep of a specific is denied, although the Court has held that its restraints are absorbed in the Fourteenth Amendment for some purposes. Only this Term we applied, admittedly not in terms but nevertheless in fact, the privilege against compulsory self-incrimination guaranteed by the Fifth Amendment to invalidate a state conviction obtained with the aid of a confession, however true, which was secured from the accused by duress or coercion. *Rogers v. Richmond*, — U. S. —; and see *Bram v. United States*, 168 U. S. 532. And not too long ago we invalidated a state conviction for illegal possession of morphine based on evidence of two capsules which the accused had swallowed and then had been forced by the police to disgorge. *Rochin v. California*, 342 U. S. 165. But the Court today relies upon earlier statements that the immunity from compulsory self-incrimination is not secured by the Fourteenth Amendment against impairment by the States. These statements appear primarily in *Twining v. New Jersey*, *supra*, and *Adamson v. California*, *supra*. Those cases do not require the conclusion reached here. Neither involved the question here presented of the constitutionality of a penalty visited by a State upon a citizen for invoking the privilege. Both involved only the much narrower question whether comment upon a defendant's failure to take the stand in his own defense was constitutionally permissible.

However, all other reasons aside, a cloud has plainly been cast on the soundness of *Twining* and *Adamson* by

our decisions absorbing the First and Fourth Amendments in the Fourteenth. There is no historic or logical reason for supposing that those Amendments secure more important individual rights. I need not rely only on Mr. Justice Bradley's famed statement in *Boyd v. United States*, 116 U. S. 616, 632, that compulsory self-incrimination "is contrary to the principles of a free government. It is abhorrent to the instincts of an . . . American." It may suit the purposes of despotic power; but it cannot abide the pure atmosphere of political liberty and personal freedom." I may also call to my support the more current appraisal in the same vein in *Ullmann v. United States*, 350 U. S. 422, 426-428. The privilege is rightly designated "one of the great landmarks in man's struggle to make himself civilized." Griswold, *The Fifth Amendment Today*, [1955] 7. But even without the support of these eminent authorities, I believe that the unanswerable case for absorption was stated by the first Justice Harlan in his dissent in *Twining*, *supra*, p. 114. Therefore, with him: "I cannot support any judgment declaring that immunity from self-incrimination is not . . . a part of the liberty guaranteed by the Fourteenth Amendment against hostile state action." *Id.*, at 126. The degree to which the privilege can be eroded unless deterred by the Fifth Amendment's restraints is forcefully brought home in this case by the New York Court of Appeals' departure from its former precedents. See Judge Fuld's dissent, 7 N. Y. 488, —, — N. E. 2d —, —.

I would hold that the full sweep of the Fifth Amendment privilege has been absorbed in the Fourteenth Amendment. In that view the protection it affords the individual, lawyer or not, against the State, has the same scope as that against the National Government, and, under our decision in *Slochower v. Board of Education*, 350 U. S. 551, the order under review should be reversed.